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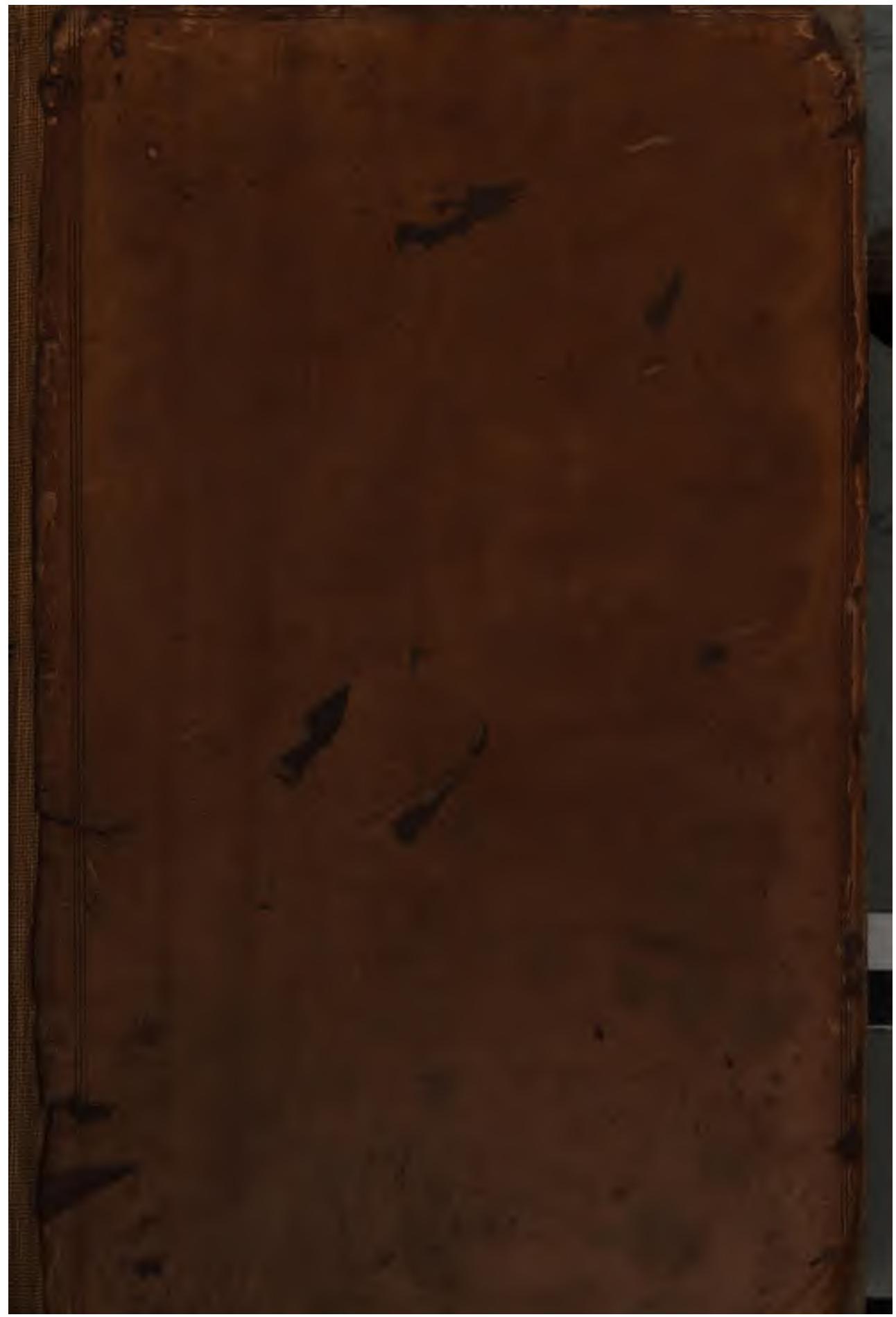
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R E P O R T S
OF
C A S E S
ARGUED AND DETERMINED
IN
The Court of King's Bench.

WITH TABLES OF THE NAMES OF THE CASES
AND THE PRINCIPAL MATTERS.

BY
RICHARD VAUGHAN BARNEWALL, OF LINCOLN'S INN,
AND
CRESSWELL CRESSWELL, OF THE INNER TEMPLE, ESQRS.
BARRISTERS AT LAW.

V O L. VI.
Containing the Cases of MICHAELMAS, HILARY, and EASTER Terms,
in the 7th & 8th Years of GEO. IV. 1826-7.

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明治三十一年九月

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J U D G E S
OF THE
COURT OF KING's BENCH,

During the Period of these REPORTS.

CHARLES LORD TENTERDEN, C. J.
Sir JOHN BAYLEY, Knt.
Sir GEORGE SOWLEY HOLROYD, Knt.
Sir JOSEPH LITTLEDALE, Knt.

ATTORNEY-GENERAL.

Sir CHARLES WETHERALL, Knt.
Sir JAMES SCARLETT, Knt.

SOLICITOR-GENERAL.

Sir NICHOLAS C. TINDAL, Knt.



A

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C A S E S

ARGUED AND DETERMINED

1826.

IN THE

Court of KING's BENCH,

IN THE

Michaelmas Term,

In the Seventh Year of the Reign of GEORGE IV.

MEMORANDA.

IN the course of the last vacation the Right Honourable Lord *Gifford*, Master of the Rolls, died. He was succeeded by Sir *John Singleton Copley*, Knight, his Majesty's Attorney-General.

Sir *Charles Wetherell*, Knight, his Majesty's Solicitor-General, succeeded to the office of Attorney-General; and *Nicolas Conyngham Tindal*, of *Lincoln's Inn*, Esquire, succeeded to that of Solicitor-General, and was afterwards knighted.

1826.HOLLOWAY and Another *against* BERKELEY.

When a copyhold tenement, holden by heriot custom, becomes the property of several as tenants in common, the lord is entitled to a heriot from each of them; but if the several portions are reunited in one person, one heriot only is payable.

TROVER for six horses. At the trial before *Littledale J.*, at the *Hampshire* Summer assizes, 1825, a verdict was found for the plaintiffs for nominal damages, subject to the opinion of this Court, on the following case. The plaintiffs are the executors of the last will and testament of one *George Hazelar Andrews*, deceased, and the defendant was, at the time of the death of *G. H. Andrews* and from thence hitherto, and still is the lord of the manor of *Bosham*, in the county of *Sussex*. The horses in question were the property of *G. H. Andrews* at the time of his death, and had been seized and taken by the defendant as and for heriots as hereinafter mentioned. Within the manor of *Bosham* there are, and from time immemorial have been, divers customary tenements, called and known by the name and description of *Boardland* tenements, demised and demisable by copy of the court rolls of the said manor, by the lord of the manor, or by his steward of the court thereof for the time being, in fee simple or otherwise, according to the custom of the manor; and by the custom of the manor, there is payable to the lord, on the death of any tenant of any of the copyhold tenements called *Boardland*, who shall die seised thereof, as and for a heriot, in respect of each of the said copyhold tenements, the best beast of the said tenant at the time of his death. In the year 1812 one *John Andrews* died seised in his demesne as of fee, of six copyhold tenements of *Boardland*; and upon the death of *J. Andrews*

drews there happened to the lord of the manor, according to the custom of the said manor, for heriots in respect of the said six several copyhold tenements the six best beasts of him *J. Andrews*, that is to say, one beast for each of the said several tenements. Previously to his death *J. Andrews* had surrendered the said several tenements to such uses as should be declared by his last will and testament; and after such surrender, he, by his will, bearing date the 16th *April* 1812, gave and devised the said six copyhold tenements to his two sons, *G. H. Andrews* and *J. Andrews*, and their heirs for ever, as tenants in common and not as joint tenants. At a court holden for the said manor, on the 29th day of *August* 1812, *G. H. Andrews* was admitted to one undivided moiety or half part or share, the whole into two equal parts or shares to be divided, of and in the said six several copyhold tenements, to have and to hold to him, *G. H. Andrews* and his heirs, by copy of court roll, according to the form and effect of the last will and testament of *J. Andrews* deceased, and according to the custom of the manor, by the apportioned yearly rents, heriots, suit of court, and other services, therefore formerly due and of right accustomed; and at the same court *J. Andrews* was in like manner and form admitted to the other undivided moiety of the said six copyhold tenements. At a court holden for the manor on the 22d of *February* 1818, *J. Andrews*, for a valuable consideration paid to him by *G. H. Andrews*, duly surrendered into the hands of the lord his undivided moiety of and in the said several tenements, to the use and behoof of *G. H. Andrews*, and his heirs for ever, according to the custom of the manor; and at the same court, *G. H. Andrews* prayed to be, and was, admitted

1826.

HOLLOWAY
against
BREKELY.

CASES IN MICHAELMAS TERM

1826.

HOLLOWAY
against
BERKELEY.

tenant of and to the said moieties, lands, tenements, and premises so surrendered, to have and to hold unto him, *G. H. Andrews* and his heirs, by copy of court roll, according to the custom of the manor, by the yearly rents, heriots, suit of court, and other services therefore formerly due and of right accustomed. *G. H. Andrews* died in the year 1824, seised of the said several tenements as aforesaid, whereupon the defendant, then being the lord of the manor of *Bosham*, claimed to be entitled to, and seized and took twelve horses, as and being the twelve best beasts which were of *G. H. Andrews* at the time of his death, as heriots for and in respect of the said several tenements. The action was brought to recover the value of six of the said twelve horses, being the six which were marked, and agreed upon between the plaintiffs and the defendant, upon the seizure thereof as aforesaid, as being the inferior beasts; and the question for the opinion of the Court was, whether the defendant, as such lord, was entitled to twelve or only to six heriots, in respect of the said several tenements whereof *G. H. Andrews* died seised as aforesaid.

This case was argued at the sittings in Banc. after last term by

Carter for the plaintiff. There are two cases upon which this question depends, *Attrie v. Scutt* (*a*), upon which the defendant relies, and a later decision, *Garland v. Jekyll* (*b*), which is expressly in point for the plaintiff. The former case related to fines payable on admittance to a copyhold, and therefore is not strictly applicable. But it will be said that the Court then treated the

(*a*) 6 *East*, 476.

(*b*, 2 *Bing.* 273.

question

question of heriots as settled. That judgment proceeded on the authority of the case in *Fitz. Abr. Heriot*, pl. 1. Many remarks were made upon that case by *Best C. J.* in giving judgment in *Garland v. Jekyll*; but perhaps it is unnecessary to say that the case in *Fitz.* is not law; for, supposing it to be a good decision, it by no means establishes the claim to several heriots in this case. Hertiots are said to be personal in their nature, and paid in respect of the estate held of the lord by the tenant, and not a charge upon the land. It may be presumed that when the lord granted out a copyhold tenement, he bargained for a heriot; and if by the act of the tenant several tenements were created, several heriots might become due; and to such a case alone the passage in *Fitz.* seems applicable. He says that if a tenant, holding by a heriot, alien *parcel of the land* to another, each is chargeable with a heriot. By such alienation distinct copyhold tenements would be created, and a repurchase would not have the effect of reuniting them; but in this case no actual separation took place. It is true that Lord *Ellenborough*, in *Attree v. Scutt*, said that the case would be the same if the land were held by several in common, and not in severalty; but that is not warranted by the authority upon which he relied; and as upon a re-union of the several portions in one person the lord would be in the same situation by receiving one heriot as when the tenement was originally granted, there does not appear to be any good reason why he should be entitled to more.

Mercetether contra. It is a fundamental principle in the law of copyholds that the lord cannot, by any act that he can do, deprive the tenant of his rights, *Lane's*

1826.

HOLLOWAY
against
BERKELEY.

CASES IN MICHAELMAS TERM

1826.

HOLLOWAY
against
BRUERTON.

case (*a*) ; and that the tenant cannot by his act prejudice the rights of the lord, *Kite and Queinton's* case. (*b*) When, therefore, in this case the tenements were divided so as to make several heriots due to the lord, the tenant could not by repurchasing any of the portions deprive him of that right. *Bruerton's* case (*c*) and many others have proceeded on this ground; and in *Attree v. Scutt* a judgment was given by Lord *Ellenborough*, which if it be well founded is decisive of the present case. That judgment was certainly overruled by the Court of C. P. in *Garland v. Jekyll*, and one of the principal grounds assigned for overruling the former decision was, that the case in *Fitz. Abr.* upon which Lord *Ellenborough* relied, was not entitled to any weight. *Best C. J.* is reported to have said that there was some great mistake as to that case. That it was a loose note, probably the decision of a judge at Nisi Prius. That it would not be found in any one book of authority. That it was not to be found in *Brooke's* or *Rolle's Abr.*, in *Viner*, or in *Com. Dig.* But that it was to be found in *Kitchen on Courts*, and in a way that showed it was greatly mistaken by *Fitzherbert*. The Lord Chief Justice of the C.P. is then said to have read from *Kitchen* this passage: " If any tenant which holds of one by a heriot alien parcel of his land to another, every one of them shall pay a heriot for that, that it is entire;" and to have proceeded as follows: " There the passage stops; there is not a word implying that if they are again united they shall pay more than one heriot; he refers to *Fitzherbert* only, and not to the year book." His Lordship had before observed that *Fitzherbert* could not mean to refer to the year book as

(a) 2 Co. 17.

(b) 4 Co. 25.

(c) 6 Co. 1.

his

his authority, for there is no year book of the 34 *E. 3.*, in which year the case is supposed to have occurred. It is true that in the printed year books which have come down to us there is a chasm from the 30th to the 38th *Ed. 3.*, but still many manuscript notes of cases decided in the interval may have been, and probably were, at some time extant. There are other chasms in the year books, and the cases decided during one of them (viz. from the 10 to the 18 *Edw. 3.* inclusive) are extant in MS. in the *Inner Temple* library. In *Statham's Digest*, the earliest published, several cases are stated as having been decided in the interval between the 30 and 38 *Ed. 3.*, and under title *Heriot* the case in dispute is found. In *Com. Dig.* tit. *Copyhold*, (K. 19.) the same case is adopted. Then as to *Kitchen*, it is true that in p. 264. (a) he cites only that part of the case in *Fitzherbert* which is mentioned in 2 *Bing.* 301., but in p. 266. the whole case as stated by *Fitzherbert* and *Statham* is adopted, and reference is made to the latter book. Lord *Coke*, in stating the resolutions of the two Chief Justices and the Court of Wards in *Bruerton's* case, also refers to it; and in *Talbot's* case (b) he states that it was cited by the plaintiff's counsel. It is also adopted in *Scroggs on Courts Leet*, 157.; and there is not in any one of these books a doubt suggested as to the accuracy of the statement in *Fitz.*, or the propriety of the decision. The judgment of this Court in *Attrie v. Scutt* cannot then be impugned on the ground of its having proceeded on a case of no authority. The passage in *Co. Copy.* 130., cited in *Garland v. Jekyll*, is certainly in favour of the judgment there given. " If two joint tenants, two

1826.

HOLLOWAY
against
BERKELEY.

(a) *Edit.* 1651.(b) 8 *Cv.* 208.

1826.

HOLLOWAY
against
BRAKELEY.

tenants in common, or tenant for life and he in the remainder join in the grant of a copyhold, one fine only is due, and it shall enure as one grant only." Now that is certainly true as to joint tenants and tenant for life, and the remainder-man, but there is no authority to support the position when applied to tenants in common. The case referred to in the margin *4 Co. 27. b.* does not support it; and the case put in *Browning v. Beston (a)*, that a grant of a rent-charge of 20s. out of their land by two tenants in common, shall enure as several grants of 20s., because their estate is several, is an authority the other way. There is not any substantial distinction between a severance of the title and severance of the land, in each case the estate is holden by a separate copy of court roll; in each that is the title and regulates the rights of the lord and the tenant.

Carter in reply. The lord is not in this case prejudiced with reference to the bargain which must be supposed to have been made when this copyhold tenement was originally granted. He had one heriot then, and if he has one now he has no ground of complaint, although during some intermediate period he may have enjoyed still greater advantages. The passage in *Co. Copy.* does not depend on the authority of the case referred to. The preceding part of the section shows that Lord Coke had in view the distinction between a severance of title and a severance of the land.

Cur. adv. vult.

BAYLEY J. in the course of this term delivered the judgment of the Court:

The question in this case was whether double heriots

(a) 1 *Plowd.* 140.

were

were payable upon death in respect of what had heretofore been six copyhold tenements. They were held of the manor of *Bosham*, and by the custom of that manor, there is payable to the lord on the death of any tenant of any of the copyhold tenements called *Boardland* dying seised thereof, as and for a heriot in respect of each of the said copyhold tenements, the tenant's best beast. In *April* 1812 *John Andrews* died seised of these tenements, having previously surrendered them to the use of his will, and having devised them to his two sons, *George Hazelar Andrews* and *James Andrews*, as tenants in common in fee. In *August* 1812 the two brothers were respectively admitted to undivided moieties, and in *February* 1818 *James* surrendered his moiety to his brother *George Hazelar*, and he was admitted thereto. There never, therefore, was any dying seised whilst the moieties were in different ownerships, no heriot ever payable for a separate moiety, and no instance in which the heriots were in fact multiplied. In 1824 *George Hazelar Andrews* died seised, and upon his death the lord seized two beasts in respect of each of the six copyholds, and for the seizure of six, i. e. all but one on each, this action was brought. The question, therefore, in substance is, whether upon a tenancy in common, the share of each tenement constitutes a *distinct tenement*, or whether, notwithstanding the distinct *estates* of each tenant in common, the copyhold does not still remain an entire tenement. The custom, (which is against common right, and to be construed strictly,) gives a heriot in respect of each *tenement* of which the copyholder dies seised. It is not in respect of *each estate* in a copyhold tenement of which the tenant dies seised, but in respect of each *tenement*. In the case of heriot service or heriot custom the law multiplies

the

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the heriot in two cases, one, where the tenement is actually divided, and converted into two or more separate tenements, the other where the tenement is left intire, but different persons have distinct undivided estates therein. Before the statute of quia emptores, if tenant in fee who held under certain services, aliened part of his land in fee without the lord's assent, the lord might nevertheless distrain either upon the land sold, or upon the land retained, for the whole of his services, and the lord was entitled to consider the whole tenement as if it remained entire, 10 H. 7. 10. pl. 26. *Co. Litt.* 43. a., and because this statute did not bind the king, the same continued in the king's case, notwithstanding this statute, *Plowden* 240. But in ordinary cases since the statute, any freehold tenant may subdivide his tenement, and alien part, and such of his services as are divisible will be liable to be apportioned, and such of his services as are entire, will be multiplied, but the alienee will in such case hold his portion as an entire independent tenement, his portion will be liable to the apportioned proportion only of the divisible services, and the residue will also be held as an entire independent tenement, liable only to its apportioned proportion of the divisible services. If, for instance, C. has 300 acres of freehold land at 15*l.* rent, fealty, homage, and heriot, and he aliens 100 acres to A., 100 to B., and retains 100 to himself, and each 100 acres is of the same value, A. will hold 100 acres at 5*l.* rent, fealty, homage, and heriot, and B. and C. respectively will do the same, and each will hold his proportion as a separate independent tenement. A.'s tenement, and B.'s and C.'s respectively, will no longer be liable to the 15*l.* rent, but to the 5*l.* only, and it is not necessary in this case to say whether by the union of the three

tenc-

tenements in one person, the 1*l.* rent would again be revived, and extend over the whole estate, or whether the three tenements would each continue a distinct tenement, liable to its 5*l.* only. If a copyhold tenant can subdivide his tenement in the same manner, the same consequences follow. But will the creation of a tenancy in common have the same effect in producing, even for a time, separate tenements? Where the tenement is subdivided, each tenant holds his share in severalty, and it is subject to nothing beyond its own services. In the case of a tenancy in common, the tenement is undivided; none of the tenants in common, be there what number there may, knows his own in severalty; the services, which in case of division would be divisible, remain entire, and the whole land is liable to all the services. In case of copyholds, they are not within the statutes of partition, because the *alteration of the tenure* without the lord's consent, may sound to the lord's prejudice. *Co. Cop. s. 54. (a)* And how will the tenure be altered, but by splitting into two or more several tenements what before was an entire tenement. In the comment upon the 2d chap. of the statute of quia emptores Lord Coke makes the distinction between the alienee of the distinct parcel of a freehold tenement and the creation of a tenancy in common. That branch of the statute provides, "that if a freeman sell any part of his lands or tenements the feoffee shall hold immediately of the chief lord, and shall be forthwith charged with the services for so much as belongs or ought to belong to the chief lord for that parcel (particula illa) according to the quantity of the land or tenement so

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(a) See *Rowden v. Malister*, Cro. Car. 44. Com. Dig. Cop. O.

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sold. And so in this case, the same part of the services shall remain to the chief lord to be taken by the hands of the feoffee, for the which he ought to be attendant upon and answerable to the chief lord, according to the quantity of land or tenement sold for the parcel of the services so due." This provision is the foundation of apportionment in these cases; rent, where that is one of the services not being apportionable at common law; *3 Vin. Abr. Apportionment*, note to pl. 1. Upon that part of this clause which relates to the holding part of the chief lord, and at a proportion of the services, Lord Coke's Commentary (*a*) is this: *particula illa* (for which he is to be charged) is understood of a part *in severalty*, and not in common; and therefore it is holden, that if the tenant make a feoffment in fee of the moiety or third part of the tenancy, that such a feoffee is not within the purview of this statute; for a moiety or third part *pro indiviso* is not *particula*, for that word impieth a part in severalty. (*b*) And the meaning of this passage is very distinctly explained in *Bro. Ab. Tenures*, pl. 64., from 29 H. 8., which Lord Coke cites. "A man makes feoffment of the moiety of his land; the feoffee shall hold of the lord by the entire services by which the entire land was held before, for the statute *tenendo pro particula* has not place here, for a moiety is not *particula*, and there is a contrariety between one or two acres in certain and a third part, or the like, which extends through the part and the whole (*q. va. per mye et per tout.*") This authority, therefore, shews clearly, that in the case of freehold lands which are

(*a*) 2 Inst. 503. See also 6 Co. 1 b. *Plowd.* 240. *F. N. B.* 162 d.

(*b*) See 6 Co. 1 b.

within

within the statute of quia emptores, the creation of a tenancy in common leaves the services entire, and, consequently, must leave the tenement entire also; and if this be the case in freeholds, à fortiori must it in the case of copyholds. *Co. Copyh.* s. 56. p. 130., cited in 6 *Vin.* 105., is an authority in case of copyholds upon the same point; for, after noticing, that "if several copyholders join in a grant of their copyholds by one copy, or if one copyholder, having several copyholds, grant them by one copy, yet the grantee shall pay several fines, for they shall enure as several grants;" he adds, "but if two joint tenants, two tenants in common, or tenant for life and he in remainder join in the grant of a copyhold, one fine only is due, and it shall enure as one grant only." *Kitchen*, 245. is nearly to the same purpose; "Also, if tenant for life and he in remainder or reversion join in a surrender to one and to heirs, he to whose use the surrender is made shall pay but one fine, for it is but one admittance and not several, and one surrender and not several, and there is but one tenant admitted; the same law where two joint tenants, two tenants in common, or coparceners, surrender to one and his heirs, shall be paid but one fine." These authorities appear to me to establish a plain distinction between the alienation of an entire part and the creation of a tenancy in common, and to shew, that though the former may split one tenement into several, the latter will not. I would notice also, that the former, the alienation of an entire part, must always be the act of the owner in fee of the whole, so that whoever feels the consequences must claim through the person by whose act they were occasioned; whereas the owner of a part of the tenement only, viz. one of several joint tenants, or one of several parceners,

may

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may create a tenancy in common, and if a tenancy in common would create a division into distinct tenements, every division would increase the number of tenements in geometrical progression. Dividing the whole *six times* into moieties (which would be allowing something short of one division every century since the commencement of legal memory) would make what was originally one tenement 64 ($2 - 4 - 8 - 16 - 32 - 64$), and dividing it six times into three shares would make it 729 ($3 - 9 - 27 - 81 - 243 - 729$), and we might have in pleading, what I apprehend has never been hitherto seen — a statement that a man was seised in his demesne as of fee at the will of the lord, according to the custom of the manor, of 729 undivided parts of certain copyhold lands, the whole into 729 parts to be divided. Such a singularity will, I trust, never be seen; but whatever may at any time have been the number of tenants in common of what was originally one copyhold tenement, when all the interests are again vested in one person, he may consider himself as seised not of so many undivided portions of the land, but as the sole proprietor of one entire estate and tenement. And if this be the true view of the effect of a tenancy in common, and the proper light in which the question in this case ought to be viewed, it will not be necessary to occupy much time in noticing the authorities which were relied upon in the argument. The authority from *Fitzh.* is the case not of the creation of a tenancy in common, but of a severance of the estate into distinct *parcels*, and the alienation of one of those parcels of his land to others. And if we are right in supposing that the creation of a tenancy in common in what was previously an entire tenement will not destroy the entirety

tirety of the tenement, it is immaterial to consider what will be the effect of severing a tenement into distinct parcels. It does not appear from *Fitzh.* whether that was the case of a *copyhold* or of a *freehold* tenement, but it has been frequently noticed in subsequent cases (*a*), and it is a relief to us not to be called upon to impeach it. Whether it be a right or a wrong decision, we consider a matter still open for discussion. In *Attree v. Scutt*, it may be difficult to collect from the report whether there was not a severance of the tenements so as to allot to one tenement what had previously been parcel of another; but the judgment of the Court appears to have proceeded upon the ground, that the creation of a tenancy in common, though there was no division or severance of the property, created distinct and separate tenements, and in that respect we think that decision wrong. *Garland* and *Jekyll* was a case of the creation of a tenancy in common, and upon the principle that the creation of a tenancy in common leaves the tenement entire, we think the decision in that case right. It is not necessary for us to say what would have been our opinion had that been a case in which there had been an actual severance and division of a tenement into distinct and separate parcels, so as to have given to separate holders separate properties in severalty, and we cautiously abstain from saying any thing on that point.

Postea to the plaintiffs.

(*a*) 6 Co. 1 a. 8 Co. 105 a. *Palms.* 342. *Kitchen on Copyholds*, 269.
Com. Dig. Copyhold, K. 19.

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HOLLOWAY
against
BARKER.

1826.

*Tuesday,
November 7th.*

PIGOTT, Clerk, against BAYLEY.

Where, in debt
for not setting
out tithe of
hay, plaintiff
averred that
there was a
certain immem-
orial custom
as to setting
out the tithe
“within the
parish, and the
limits, bounds,
and titheable
places there-
of;” Held,
that this aver-
ment was prov-
ed by evidence,
that the custom
prevailed in all
parts of the
parish where
tithe of hay was
set out; and
that proof of a
modus for hay
in one township
made no differ-
ence. *Littledale J.* dubi-
tante.

DEBT by the plaintiff, rector of the parish of *Edgmond*, in the county of *Salop*, against the defendant upon the 2 & 3 Ed. 6. c. 13. for not setting out tithe. The plaintiff in his declaration averred, that “from time immemorial there hath been within the parish of *Edgmond*, the bounds, limits, and titheable places thereof, a custom of and concerning the tithe of hay, that every eleventh cock of hay after the grass has been mowed and cut down, and so managed, treated, and dealt with, as to be in a fit state to be carried from the ground and made into ricks, after the course of good husbandry, shall be separated, divided, and set out from the residue of the cocks, for the tithe of all the hay so mowed and cut down as aforesaid;” and that the defendant mowed divers, to wit, fifty acres of hay, and did not set out the tithe according to the custom. Plea, nil debet. At the trial before *Garrow B.*, at the last Summer assizes for *Salop*, evidence was given of tithing according to the alleged custom in most parts of the parish of *Edgmond*, and no evidence was given of any other mode of tithing hay; but it was proved, that in one township (*Tibberton*) there was a modus for hay, and it was thereupon objected for the defendant, that the custom was not proved as alleged. The learned Judge overruled the objection, but gave the defendant leave to move for a nonsuit, and a verdict having been found for the plaintiff,

Taunton

Taunton now moved for a rule nisi to enter a nonsuit. It is a general rule as to all customs and prescriptions, that they should be proved as broadly as laid. Now, the plaintiff in the present case failed in proving the custom as alleged in his declaration. [Holroyd J. It was proved that the custom prevailed in all parts of the parish where the tithe of hay was payable.] The custom was laid as being co-extensive with the parish, and as judgments upon customs of this nature are evidence between other parties, the judgment in this case may hereafter be made use of by the rector in disputing the modus which now prevails in the township of *Tibberton*. The plaintiff should therefore have been compelled to prove in this action, that the custom extended to that as well as the other parts of the parish. The mode of pleading a right of common, shews how strict the law is upon this point. If a man have a certain number of acres intermixed in a large field over which he has a right of common, he cannot claim the right over the whole field, but must except his own lands. (a)

1826.

 Pigott
against
BAYLEY.

ABBOTT C. J. I think the Court may very fairly understand the meaning of the allegation in question to be, that wherever the tithe of hay was set out in kind, in the parish of *Edgmond*, that mode of setting it out prevailed, which was stated in the declaration; and that was proved. The allegation is, that the custom prevails *within* the parish; if it had been, that the custom prevails *throughout* the parish, there might have been some weight in the objection.

(a) See *Vin. Abr. Prescription* (Y), pl. 23.

CASES IN MICHAELMAS TERM

1826.

Picott
against
BAYLEY.

BAYLEY J. I put the same construction upon the statement of the custom, and then it is no objection that a modus prevailed in one township. If that modus should hereafter be proved to be a bad one, the evidence given in this case would, if uncontradicted, be sufficient to establish the custom as to the township where that modus now exists.

HOLROYD J. I think that the custom, as stated, was substantially proved. The custom is applicable to the setting out of the tithe of hay, and to that only. It cannot apply to places where that tithe is not set out, such places are therefore virtually excluded.

LITTLEDALE J. Supposing the statement of the custom be construed as an averment that it prevails throughout the parish, that averment was not proved, *Rogers v. Allen.* (a) The question then is, whether the statement is to be considered as an averment, that the custom prevails throughout the parish. I am inclined to think that it is, but the majority of the Court being of a different opinion, the defendant cannot have a rule.

Rule refused.

(a) 1 Camp. 309.

1826.

KOSTER against REED, Bart., and Another, *Tuesday,
November 7th.*
Administrators of Sir T. REED, deceased.

A SSUMPSIT on a policy of assurance on goods sent by *La Vergine della Solitudine*, on a voyage from *Leghorn* to *Lisbon*. The declaration averred that the policy was effected by the plaintiff as agent of *Leon Taurel*, that on the 9th of *April* 1821, the goods insured were shipped at *Leghorn*, and that the vessel sailed on that day with the goods on board from *Leghorn* on the voyage insured, and was lost by perils of the sea. There was another count alleging a loss by barratry. Plea, the general issue. At the trial before *Abbott C.J.*, at the *London* sittings after last *Trinity* term, it was proved that the vessel, with the goods insured on board, sailed from *Leghorn* in *April* 1821 on the voyage insured, and that she never arrived at *Lisbon*; and a witness called by the plaintiff stated, that three or four days after the vessel sailed from *Leghorn* he heard that she had foundered at sea, but that the crew were saved. For the defendant it was objected, that the mere fact of non-arrival did not prove a loss by perils of the sea or by barratry, and that if the evidence last stated were resorted to, it was incumbent on the plaintiff to call some of the crew, or to shew that he had ineffectually endeavoured to procure their attendance. The Lord Chief Justice overruled the objection, and summed up the whole of the evidence to the jury, who found a verdict for the plaintiff; and now

Where, in as-
sumpsit on a
policy of insur-
ance on goods
by a certain
ship, it was
proved that she
sailed on the
voyage insured
with the goods
on board, and
never arrived
at her port of
destination, and
that a few days
after her de-
parture, a re-
port was heard
at the place
whence she
sailed, that the
ship had foun-
dered at sea,
but that the
crew were
saved: Held,
that this was
sufficient prima
facie evidence
of a loss by
perils of the
sea, and that
the plaintiff
was not bound
to call any of
the crew, or to
show that he
was unable to
procure their
attendance.

Barnewall moved for a rule nisi for a new trial. There was not in this case any evidence of a loss by

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 Koster
against
Ried.

perils of the sea or by barratry. As soon as it appeared that the crew survived the loss of the ship, it was incumbent on the plaintiff to call them. [*Bayley* J. The evidence that the crew survived, was merely hearsay evidence, and may be laid out of the case.] Then there was nothing to prove the loss, except the fact of non-arrival at *Lisbon*. It may be conceded that non-arrival after so long a period had elapsed proved a loss of some sort, but it did not prove a loss by the perils mentioned in the declaration. In every case to be found in the books where non-arrival has been relied on to prove a loss by perils of the sea, the plaintiff went one step further, and proved that the ship had never been heard of after a certain period, and then it was held, that inasmuch as if the crew had survived they would probably have given some tidings of the vessel, it was to be presumed that the vessel and all on board perished at sea. *Green v. Brown* (a), *Newby v. Read* (b), *Twemlow v. Oswin* (c), *Houston v. Thornton* (d), all proceeded upon this ground; in each of them it was proved that the vessel had never been heard of; and the *Ordonnance de la Marine*, Liv. 3. T. 6. des Assurances, Art. 58., is to the same effect. "Si l'assuré ne reçoit aucune nouvelle de son navire, il pourra, après l'an expiré, (à compter du jour du départ pour les voyages ordinaires,) et après deux ans (pour ceux de long cours,) faire son délaissement aux assureurs, et leur demander paiement, sans qu'il soit besoin d'aucune attestation de la perte." *Valin* in his commentary on this article, after observing that the same rule is laid down in *Guidon* and other books, observes, that the assured cannot abandon if the assurers or any third persons have within the spe-

(a) 8 *Sir.* 1199.(b) *Park. Ins.* 106.(c) *Camp.* 85.(d) *Holt. N. P. C.* 242.

cified

cified time received intelligence of the vessel. (a) But, secondly, the evidence of the witness, who said he heard of the loss, and that the crew survived, must be taken into consideration. The plaintiff tendered it, and it was not objected to; the defendant, therefore, is entitled to the benefit of it now, especially as the Lord Chief Justice left it to the consideration of the jury. It must be taken then that the crew survived the loss of the vessel, and that fact having been established, the plaintiff was bound to call some of them, or to account for their absence, he did not otherwise give the best evidence that the nature of the case admitted, and the evidence which he had before given ought not, under such circumstances, to have been left to the jury, *Williams v. E. I. Company.* (b) In *Bull. N. P.* 293. it is stated as the first general rule of evidence, that the party must give the best evidence that the nature of the thing is capable of. (c)

1826.

Koers
against
Rule.

ABBOTT C. J. The only question is, whether in this case there was sufficient to be left to the jury as evidence of a loss by perils of the sea or by barratry? The defendants now contend that the plaintiff should have proved that which it was impossible for him to do, viz. that the ship had never been heard of, for she had been heard of, and the account received was, that she foundered at sea. The evidence given at the trial was, that the vessel, with the goods insured on board, sailed from *Leghorn* in *April 1821*, for *Lisbon*,

(a) See *Vallin's Commentary*, *Rochelle* edit. 1766. vol. ii. 141.

(b) *3 East*, 192.

(c) See the observations upon this rule in *1 Stark. on Ev.* 389., and particularly upon the case of *Williams v. E. I. Company*, which seems to have occasioned some misapprehension as to the nature and extent of the rule. The expression used in *Bac. Abr. Evidence* (I), that "the law requires the *highest proof* the nature of the thing is capable of," appears to be more appropriate, and less liable to misconstruction than *best evidence*.

CASES IN MICHAELMAS TERM

1826.

Kosza
against:
Reed.

that she never arrived at that place, and that a few days after her departure from *Leghorn*, the witness heard that she had foundered at sea, but that the crew were saved. Taking the whole of that account together, it proved a loss by perils of the sea, but we are asked to take half of it only, viz. that the crew survived; and to exclude from our consideration that which related to the loss of the ship. I think we should not be justified in so doing, and that it is impossible for us to say that at this distance of time it was incumbent on the plaintiff to send all over *Europe* in search of the crew of this vessel, whom we must suppose to have been foreigners, the ship being foreign, and trading between foreign ports. For these reasons it appears to me that there was sufficient evidence to be left to the jury, and that the verdict ought not to be disturbed.

BAYLEY J. I am of the same opinion. When it is said that a ship has not been heard of, I take that to mean that no intelligence has been received from persons capable of giving an authentic account; and not that mere rumours have never been heard. In that sense the vessel in question had never been heard of. But althoagh such evidence has frequently been given, it cannot in all cases be essential. In the present case the plaintiff was owner of the goods, not of the vessel, and the underwriters might have just as good means of inquiring about the crew as the plaintiff had. Why then is it not as reasonable to call upon them to prove affirmatively that intelligence of the ship had been received, as upon the plaintiff to prove the negative. In the absence of any such evidence, I think it was fair to presume that the ship perished at sea.

HOLROYD

HOLROYD J. I think there was sufficient *prima facie* evidence of a loss by perils of the sea, and it was just as reasonable to expect the defendants to give evidence to rebut that, as to call upon the plaintiff for evidence in confirmation.

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 KING
against
REED.

LITTLEDALE J. concurred.

Rule refused.

The KING *against* RAWLINSON, Esq.

Tuesday,
November 7th.

A RULE had been obtained calling upon the defendant, a magistrate of the county of *Middlesex*, to show cause why a writ of mandamus should not issue directed to him, commanding him to hear and determine an information exhibited before him by the surveyor of the pavements in the South West district of the parish of *St. Pancras*, against *R. Johnson*, a hackney-coachman, for taking his stand with his chariot in *Howland Street*, in the said district, and plying for a fare there, so as to obstruct the carriage way. It appeared by the affidavits that for many years there had been a stand of hackney-coaches in *Howland Street*, but that it occasioned some obstruction to carriages going to certain parts of the street, and some of the inhabitants having complained of it as a nuisance, the commissioners of pavement for the district, thinking they had power to do so by the 12 G. 3. c. 69. s. 36. (a), on the 15th of December 1825,

Where the commissioners of pavement within a certain district were authorised by act of parliament to direct and regulate the stands of hackney coaches within the district : Held, that this gave them power to remove a stand from a street where it occasioned obstructions in the carriage-way.

made

(a) The clause is as follows: " And whereas hackney coachmen and hackney chairmen frequently take their stands with their coaches and chairs in such parts of the streets so as to occasion obstructions both in the foot and carriage ways, be it therefore enacted, that from and after the passing of this act the said commissioners, or any seven or more of

1826.

The King
against
RAWLINSON.

made an order, that the stand should be removed from *Howland Street* into a part of *Tottenham Court Road*, also within the district, and due notice was given to the coachmen not to take their stand in *Howland Street*. The coachmen thinking that the commissioners had not power to make such an order, refused to comply with it; and *R. Johnson* having taken his stand in the street, an information was exhibited against him before the defendant, in order to recover the penalty imposed by the statute. The magistrate, being of opinion that the commissioners had not authority to remove the coach-stand, refused to hear the information, and advised the informant to apply to this Court for a mandamus, whereupon this rule was obtained.

Scarlett and *Andrews* showed cause. The statute under which the commissioners of pavement acted did not give them power to make the order in question. They are enabled to *direct and regulate* the stands of hackney-coaches, which means that they may make such orders as are necessary to preserve good order and good conduct upon the stands. The order in question could not be made without a power to *alter and remove* the stands, which power certainly is not expressly given by the act. By the 9 Ann. c. 23. s. 16. power was given to the commissioners of hackney-coaches to make bye-laws binding on the persons licensed to keep hackney-coaches, and section 17. re-

them, may direct and regulate such stands of all hackney coaches and chairs within the limits of this act, as they in their discretion think proper; and if any hackney coachman or hackney chairman shall not comply with such directions and regulations, he or they shall forfeit the sum of 10s. for every such offence."

quired

quired that such bye-laws should be approved and allowed by the Lord Chancellor, the Lord Chief Justice of either Bench, and the Lord Chief Baron of the Exchequer. In 1771 the commissioners, in pursuance of the power so given, made certain bye-laws, whereby it was ordered, "that no hackney-coachman shall stand and ply in any of the high or broad streets of the cities of *London* or *Westminster*, or the suburbs thereof, being of the breadth or width of thirty feet between the posts or foot pavement on each side, or of forty feet between the houses where there are no posts or foot pavement, unless it be in the middle of such streets; nor shall stand in any street where it is not of the respective breadth or width before mentioned." And then certain places are mentioned where it should not be lawful for hackney-coachmen to ply at all. *Howland Street* is more than thirty feet wide, and is not amongst the excepted places; and it has always been understood that hackney-coaches may ply wherever they please, provided they do not violate those bye-laws. Several statutes have been passed to prohibit them from standing in certain specified places, which would have been unnecessary had they not, but for such acts, had a right to stand there. If the commissioners have the power for which they contend, they must have power to remove the coaches altogether from the district, but the Court will not easily be induced to say that the legislature intended to give them such jurisdiction.

The *Solicitor-General* contrà. Nothing can be more reasonable than that some power should exist to point out the places where hackney-coachmen may take their stand; and upon a reasonable construction of the

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against
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12 G. 3. c. 69. s. 36. it will be apparent that such a power is vested in the commissioners of pavement within the district in question. The act recites that hackney-coachmen frequently take their stands with their coaches in such parts of the streets, so as to occasion obstructions both in the foot and carriage ways; and then gives the commissioners power to direct and regulate such stands. They may therefore clearly remove the stand from one part of a street to another; and if so, why should they not remove it out of the street, if they think fit. It is said that such a power would enable them to send the coaches out of the district, but that would be an abuse of the power, and such abuse ought not to be presumed in order to raise an argument as to the construction of the act.

ABBOTT C. J. Looking at the whole of this clause, I think that *direct* means *appoint*. And if the commissioners may appoint the stands of hackney-coachmen, that necessarily includes a power of saying that they shall not take their stand in a particular place, as well as that they may do so. If that be so, the order that the coachmen should not take their stand in *Howland Street* was a valid order, and the magistrate ought to hear the information preferred against *Johnson* for refusing to obey the order. The rule must on that ground be made absolute; it is unnecessary at present to say any thing upon that part of the order whereby the coachmen were directed to take their stand in *Tottenham Court Road*.

HOLROYD J. Considering the recital of the clause in question, and the obstruction sworn to have been occa-

occasioned by the stand of coaches in *Howland Street*, I think that the commissioners of pavement had power to remove them. The recital is, that hackney-coachmen take their stands in such parts of the streets so as to occasion obstructions, and the power given is to direct and regulate *such* stands, i. e. such stands as occasion obstructions.

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LITTLEDALE J. I am of the same opinion. The validity of the bye-laws made in 1771 has never been disputed, and they prohibit hackney-coachmen from taking their stands in particular places. Now the statute 9 Ann. c. 23. merely authorizes the making of bye-laws, "for the good government and regulation" of persons licensed to keep hackney-coaches. The words of the 12 G. 3. c. 69. s. 96. are quite as large, and ought to receive as large a construction.

Rule absolute.

FREE, D.D., *against* BURGOYNE.

Wednesday,
November 8th.

PROHIBITION. A writ of error had been sued out to the Exchequer Chamber, but this Court having decided, that in prohibition a writ of error does not lie to the Exchequer Chamber (*a*), a new writ to the House of Lords was issued, and allowed; and thereupon

In prohibition, a writ of error allowed after a writ of consultation has been delivered to the court below, is not a supersedeas.

Denman moved to stay proceedings upon the consultation which had been granted in this case. The motion was made upon an affidavit, stating that after

(*a*) See 5 B. & C. 765.

the

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the former writ of error was allowed, the plaintiff moved to stay the proceedings on the consultation, which the defendant had carried down and delivered to the Court below; and that, when the Court dismissed that application, a new writ of error was sued out and allowed.

ABBOTT C. J. If the writ of consultation had been sued out after the allowance of the writ of error, the Court might have quashed it, *quia improvide emanavit*, or if it had been delivered to the Court below after the writ of error issued, that might have been a misprision, of which this would take cognassance, but it is clear upon your affidavit, that the writ of consultation had been delivered to the Court below, before the writ of error to the House of Lords was allowed. The consultation, which is in the nature of an execution on the judgment in prohibition, was thereby executed, and could not afterwards be superseded by a writ of error.

Rule refused.

*Wednesday,
November 8th.*

**DOE on the demise of TYNDALE and Others
against HEMING, GEORGE, and Others.**

Where, in
ejectment, the
attorney for the
lessor of the
plaintiff ob-
tained from one
of the defend-
ants (the tenant
in possession) a
lease of the

premises granted to him for a term not then expired, in order to prevent the defendants from setting it up to defeat the action: Held, that he thereby recognised it as a valid instrument, and that when produced in pursuance of notice from the defendants, it might be read in evidence without calling the subscribing witness to prove the execution by the grantor of the lease.

EJECTMENT for lands in *Suffolk*. Plea, not guilty.

At the trial before *Bayley J.*, at the last Summer assizes for *Suffolk*, it appeared that the lessors of the plaintiff claimed as devisees of one *Blacknell*, who, when living, was the heir at law of *Lady Graves*, who was

alleged

alleged to have been seized in fee of the premises. The plaintiff having proved his case, the defendant called for the production of a lease of the lands in question, granted by Lady Graves to the defendant George in 1812 for a term of fourteen years from October 1812. It appeared that the attorney for the lessor of the plaintiff had been making inquiries as to the situation and extent of the property, and that George voluntarily, in order to furnish information, gave him the lease. At the assizes a summons was obtained by the attorney for the defendants, calling upon the attorney for the lessors of the plaintiff, to shew cause why he should not produce the lease and allow a copy to be taken; and, thereupon, he obtained from the defendant George, authority to retain and keep the lease secret. The summons was attended, and an order made that the attorney for the lessors of the plaintiff should give the names of the subscribing witnesses to the lease, which was accordingly done. The lease when called for at the trial was produced, and the defendants not being prepared to call the subscribing witnesses, it was objected that it could not be read. The learned Judge overruled the objection, and the deed was read; whereupon the plaintiff was nonsuited; but leave was reserved to move to enter a verdict in his favour, subject to the opinion of the Court upon a case to be stated as to other points raised at the trial.

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Doc. 100.
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~~against~~
Hempsall.

Storks now moved in pursuance of the leave reserved. At the trial the lease in question was considered as a monument of the title of the lessors of the plaintiff, and therefore admissible in evidence without proof of the execution, according to the rule laid down in *Orr v. Morrice.*

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Morrice. (a) But there the lease constituted the title of the party. So in *Pearce v. Hooper* (b) the plaintiff claimed a beneficial estate under the deed. Here the title of the lessors was wholly independent on the lease, and would have been equally good had no such document existed; *Gordon v. Secretan* (c) is therefore in point.

ABBOTT C. J. It appears that the tenant *George* delivered the lease in question to the attorney for the lessors of the plaintiff as a good lease, and that he received it as a good lease. The subsequent order or authority which he obtained for the detention of the instrument was evidently obtained to prevent the defendants from setting up the lease as an answer to the action. The lessors of the plaintiff were therefore to derive a benefit from the possession of the lease, and the conduct of their attorney amounted to a recognition of it as a valid instrument. Under such circumstances, I think it was properly received in evidence without other proof of the execution, and that the nonsuit was right.

Rule refused. (d)

(a) 3 B. & B. 159.

(b) 3 Taunt. 60.

(c) 8 East, 548.

(d) See *Burnett v. Lynch*, 5 B. & C. 589.

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HOPKINS *against* GRAZEBROOK.*Thursday,
November 9th.*

A SSUMPSIT on an agreement for the sale of certain premises at *Stourbridge*, in *Worcestershire*. The declaration stated, that the defendant caused the premises to be put up to sale by auction in *November 1825*, subject to certain conditions, and amongst others, that the purchaser should immediately pay down a deposit, and should pay the residue of the purchase-money on the 25th of *March* then next, and that on payment thereof he should be let into possession, and a proper conveyance should be executed by the vendor, who undertook to make a good title. Averment that the plaintiff became the purchaser, paid a deposit, and was ready to pay the remainder of the purchase-money at the time specified, and requested the defendant to make a good title to the premises; that he did not do so, and did not execute a proper conveyance to the plaintiff, whereby plaintiff was deprived of all benefit to be derived from the purchase, and was put to great expence, &c. Plea, the general issue. The defendant paid into Court the amount of the expences which the plaintiff had been put to, and a small sum for nominal damages for the breach of contract. At the trial before *Garrow B.*, at the last *Worcester* assizes, it appeared that the premises in question were part of certain property belonging to *Hill and Co.* of *Worcester*. *Hill and Co.* had contracted for the sale of it to one *Harwood*, and the defendant had entered into an agreement to purchase the same from *Harwood*. Some misunderstanding

Where a person who had contracted for the purchase of an estate, but had not obtained a conveyance, put up the estate for sale in lots by auction, and engaged to make a good title by a certain day, which he was unable to do, as his vendor never made a conveyance to him: Held, that a purchaser of certain lots at the auction might, in an action for not making a good title, recover not only the expences which he had incurred, but also damages for the loss which he sustained by not having the contract carried into effect.

arose

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arose between *Hill* and Co. and *Harwood*, and the conveyance to the latter was never executed, the defendant, however, expecting that the matter would be arranged, and that the contract between *Harwood* and himself would be carried into effect, put up the premises to auction, as stated in the declaration, but in consequence of the disputes between *Hill* and Co. and *Harwood*, he was unable to complete his contract with the plaintiff. For the defendant, it was contended, that he had acted bona fide, (which was admitted,) and therefore could not be charged with more than nominal damages beyond the repayment of the expences which the plaintiff had incurred, and that as such damages had been paid into Court, the plaintiff must be nonsuited. The learned Judge told the jury that they were not bound to confine their verdict to nominal damages, but gave the defendant leave to move for a nonsuit. A verdict having been found for 70*l.* damages,

Campbell now moved to enter a nonsuit. The case of *Flureau v. Thornhill* (*a*), is an express authority against the propriety of the verdict. There the defendant acting bona fide, had sold property and contracted to make a good title, but could not, and the jury gave 20*l.* damages beyond the expences incurred. A motion was made for a new trial, and *De Grey* C. J. said, "I think the verdict wrong in point of law. Upon a contract for a purchase, if the title proves bad, and the vendor is, without fraud, incapable of making a good one, I do not think that the purchaser can be entitled to any damages for the fancied goodness of the bargain which

(a) 2 W. Bl. 1078.

he

he supposes he has lost;" and *Blackstone* J. added, "These contracts are merely upon condition, frequently expressed, but always implied, that the vendor has a good title. If he has not, the return of the deposit, with interest and costs, is all that can be expected." This law was adopted by Lord *Alvanley* in *Johnson v. Johnson*. (a) *Brig's case* (b), *Bratt v. Ellis* (c), and *Jones v. Dyke* (d), are also to the same effect.

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ABBOTT C.J. Upon the present occasion I will only say, that if it is advanced as a general proposition, that where a vendor cannot make a good title the purchaser shall recover nothing more than nominal damages, I am by no means prepared to assent to it. If it were necessary to decide that point, I should desire to have time for consideration. But the circumstances of this case show that it differs very materially from that which has been quoted from Sir *W. Blackstone's* reports. There the vendor was the owner of the estate, and an objection having been made to the title, he offered to convey the estate with such title as he had, or to return the purchase-money with interest; here no such offer was or could be made. The defendant had, unfortunately, put the estate up to auction before he got a conveyance. He should not have taken such a step without ascertaining that he would be in a situation to offer *some* title, and having entered into a contract to sell without the power to confer even the shadow of a title, I think he must be responsible for the damage sustained by a breach of his contract.

(a) 3 B. & P. 167.

(b) *Palm.* 364.(c) *Sugd. on Vend. and Pur.* Appr. 7.(d) *Ibid.* 8.

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BAYLEY J. The case of *Flureau v. Thornhill* is very different from this, for here the vendor had nothing but an equitable title. Now where a vendor holds out an estate as his own, the purchaser may presume that he has had a satisfactory title, and if he holds out as his own, that which is not so, I think he may very fairly be compelled to pay the loss which the purchaser sustains by not having that for which he contracted.

HOLROYD and LITTLEDALE Js. concurred.

Rule refused.

Thursday,
November 9th.

HARGRAVE against SHEWIN and DIGBY.

Replevin for taking plaintiff's corn in four closes. Avowry for rent arrear, stating that plaintiff held the closes in which, &c., at and under a certain yearly rent. Plea in bar, non tenuit modo et formâ. It appeared in evidence that the tenant held the four closes mentioned in the declaration, and two others also, at the rent mentioned in the avowry: Held, that this evidence supported the avowry.

REPLEVIN. The declaration stated that the defendants took the growing corn of the plaintiff in four closes, mentioned by name in the count. Avowry by *Shewin* and cognizance by *Digby* alleged that *W. M.*, *P. F.*, and *J. H.*, for a long space of time, to wit, &c., ending, &c., and from thence until and at the same time when, &c., held and enjoyed an undivided moiety of the said closes, in which, &c., with the appurtenances, as tenants thereof to defendant *Shewin*, by virtue of a certain demise thereof theretofore made, at and under a certain yearly rent, to wit, the yearly rent of 14*l.* 1*s.* 2*d.*, payable, &c., and so justified taking the corn for rent arrear. Plea in bar, that *W. M.*, *P. F.*, and *J. H.*, did not hold modo et formâ. At the trial before *Abbott C. J.*, at the last Summer assizes for *Lincoln*, it appeared in evidence, that *W. M.*, *P. F.*, and *J. H.*, held an undivided moiety of six closes, at the rent mentioned in the avowry,

avowry, and it was thereupon objected that this was a fatal variance between the allegation and the proof of the tenancy. The Lord Chief Justice overruled the objection, but gave the plaintiff leave to move to enter a verdict.

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against
SMERWIN.

Reader now moved accordingly, and contended, that the evidence did not support the avowry. If the rent of 14*l.* 1*s.* 2*d.* was payable for six closes, it could not be due as rent of the four closes mentioned in the declaration and referred to in the avowry. It was not perhaps necessary for the defendants to specify what premises were holden, but they should have alleged that the closes in which, &c. were holden (amongst others) at a certain rent, but as the avowry contains a precise allegation that the closes mentioned in the declaration were holden at and under a certain rent, it was incumbent on the defendants to prove the tenancy as alleged. In replevin, the contract upon which the rent becomes due must be truly stated, *Brown v. Sayce.* (a) The judgment in this case may hereafter be used to prove that the rent of the four closes is 14*l.* 1*s.* 2*d.*

ABBOTT C.J. Each part of the land is liable to the whole rent, the defendants might, therefore, properly say that the closes in which the distress was taken were held under the whole rent payable for the six closes.

HOLROYD J. The tenant held the portion of the farm mentioned in the declaration at the whole rent,

(a) 4 *Taunt.* 320.

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and a distress for the whole might have been taken in that or any part.

Rule refused. (a)

(a) Bayley J. was gone to Chambers.

Friday,
November 10th.

THOMPSON and Others *against* G. TRAIL,
 G. TRAIL the Younger, and M. BROWN.

The vendor of a quantity of tin shipped the same on board a ship bound to *Leghorn* by the orders of the vendee. The captain, by his bill of lading, undertook to deliver the tin to an individual at *Leghorn*. The tin being heavy, was placed at the bottom of the hold, with other goods over it. The vendee having become bankrupt, the vendor required the captain to deliver up the tin, but did not tender the freight or offer to make any compensation to him for the trouble of unloading the vessel. The latter refused, alleging that he had signed a bill of lading to deliver the tin to another person: Held, that this was sufficient evidence of a conversion.

TRAIL for ten barrels of tin. Plea, not guilty. At the trial before Abbott C. J., at the *London* sittings after last *Trinity* term, the following appeared to be the facts of the case. The plaintiffs were iron merchants and dealers in tin, in *London*. The defendants, *Trail*, were the owners, and the defendant *Brown*, was the master of the ship *George and Mary*. On the 23d of *January* 1826, *May, Alewyn* and Co. purchased of the plaintiffs ten barrels of tin, and by their order the plaintiffs shipped the same on board the defendant's ship, and made out the invoice to *May, Alewyn* and Co. The mate signed a receipt for the goods, in which it was stated that he had received them from the plaintiffs. The bill of lading, which was signed by the captain on the 24th of *January* 1826, stated that the goods were shipped by *May, Alewyn* and Co., and were to be delivered at the port of *Leghorn*, unto one *Sonsini* or his assigns. On the 4th of *February*, *May, Alewyn*, and Co. stopped payment, and on the 7th of *February* the plaintiffs made a formal demand upon the captain to have the tin delivered up to them, but they did not make any tender of the freight, nor any offer of compensation for the trouble of unloading the ship. At that time the greater

greater part of the cargo had been shipped, and the tin being a heavy substance, had been placed at the bottom with other goods over it. The captain refused to deliver the tin to the plaintiffs, alleging as a reason for such refusal, that he had signed a bill of lading for some other person. The Lord Chief Justice was of opinion, that this was sufficient evidence of a conversion, and a verdict was found for the plaintiffs for the value of the tin.

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against
TAIL.

Campbell now moved to enter a nonsuit. There was no evidence of a conversion. There was a demand and refusal, but there was no tender of the freight. In order to make a demand and refusal presumptive evidence of a conversion, a party at the time of making the demand ought to have a right to the possession of the goods, *Baldwin v. Cole.* (a) Here, at the time when, and the place where the demand was made, the plaintiffs had no right to the possession of the tin, for it had been delivered to the defendants to be carried to *Leghorn*. The contract on the part of the defendants was to deliver the tin, not at *London*, but at *Leghorn*. That contract was never rescinded. In pursuance of it the tin had been shipped on board the vessel, and could not be unshipped without removing the rest of the cargo, and causing great labour and expence. Suppose the ship had actually proceeded as far as *Gravesend* or *Portsmouth*, could the owner of any single bale of goods have insisted that the whole cargo should be unshipped at either of those ports, in order that his goods might be returned to him? If there had been any proof that the captain had delivered the goods at *Leghorn* contrary to the orders of the shipper, that might have been evidence

(a) 6 Mod. 212.

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against
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of a conversion, *M'Combie v. Davies*. (a) Here, the only evidence offered was the demand and refusal, and the plaintiffs, at the time when the demand was made, had no right to the possession of the tin.

BAYLEY J. Here the captain said, at the time when the demand was made, that he had signed bills of lading to deliver the tin to another person, and that he would not deliver it to the plaintiffs. He thereby dispensed with any tender of the freight. He did not allege as a reason for not delivering the tin, that he could not get at it, but merely that he had signed bills of lading to another. That being so, I think the demand and refusal was presumptive evidence of a conversion.

Rule refused.

(a) 6 East, 538.

Friday,
November 10th.

BATES *against* PILLING and SEDDON.

A. employed
B., an attorney,
 to enforce pay-
 ment of a debt.
B. directed his
 agent to sue
 out a justices
 in the county
 court. Before
 the return of
 the justices the
 debtor paid
 debt and costs
 to *B.*. His
 agent, not
 knowing of
 such payment,
 afterwards entered up judgment in the county court, although the defendant had not appeared, and sued out execution under which the goods of the debtor were seized: Held,

TRESPASS for breaking and entering the plaintiff's dwelling house, and taking his goods and chattels. Plea, not guilty. At the trial before the justices of the great sessions of the *Chester* circuit, the following appeared to be the facts of the case. *Bates*, the plaintiff, being indebted to *Pilling* in the sum of 2*l.* 5*s.* 6*d.*, the latter instructed the defendant *Seddon*, an attorney residing at *Manchester*, to apply to *Bates* for payment. *Seddon*, after making several applications to *Bates*, in-

structed

structed *Thomas Smith*, his agent at *Chester*, to issue a justicies against *Bates*, and to send it to *Birch*, a sheriff's officer at *Stockport*, to be executed. A justicies was issued, returnable the 29th of *March* 1825; it was served upon *Bates* on the 25th, and on that day he called on *Seddon* at *Manchester* and paid the debt and costs. On the 29th *Seddon* wrote to *Smith*, to inform him that the action was settled. But on the same day *Smith* had signed judgment (the defendant *Bates* not having appeared), and sued out execution and delivered it to *Birch* with instructions to levy the debt and costs, and under that execution the debt and costs were levied on the 31st of *March*. Upon this evidence it was contended, that the defendants were not liable in this form of action for assuming that *Seddon* had been guilty of negligence in not countermanding the process, still he would not thereby become a trespasser, but would be answerable only in a special action on the case. Here, *Pilling* had merely instructed *Seddon* to enforce payment of the debt, and *Seddon* had only instructed *Smith* to sue out a justicies; the latter had, therefore, exceeded his authority, and *Seddon* was not answerable. The learned judges reserved the point, and a verdict was found for the plaintiff, damages 1*s.*, with liberty to the defendants to move to enter a nonsuit.

Campbell, on the behalf of the defendant *Seddon*, now moved to enter a nonsuit. *Seddon* was not a trespasser. He never authorised the trespass committed; he merely ordered a justicies to issue, and assuming that he was guilty of negligence in not having countermanded the process as soon as he ought, still he would only be liable in a special action on the case. *Smith*, instead of

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 BATES
against
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against
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proceeding by the usual mode to compel performance, viz. by summons, attachment, and distress infinite, (*Com. Dig. tit. County, C 9.*,) signed judgment, although the defendant below had not appeared. That judgment and the execution taken out upon it were void, *Williams v. Lord Bagot.* (a) But the causing *Bates* to be arrested, was the act of *Smith* and not of *Seddon*, and although *Smith* was the agent of *Seddon*, yet he could only bind him to the extent of the authority given to him. In *Barker v. Braham* (b), it was held that trespass would lie against an attorney and client for suing out an illegal ca. sa. and causing a party to be arrested. But there the attorney personally sued out the ca. sa., and delivered it to the officer, and instructed him to arrest the party. Here, *Seddon* neither issued the writ nor authorised the issuing of it.

Chitty for the other defendant. *Pilling* was not guilty even of a nonfeazance, for he did not know that the debt was paid. [*Bayley J. Pilling*, by his agent, signed judgment against a party who had never appeared. Besides, the debt was paid to the attorney, and *Pilling* afterwards signed judgment and sued out execution.] An action will not lie against a party suing out a writ, if he neglect to countermand it after payment of the debt, unless malice be averred, *Scheibel v. Fairban.* (c) So no action will lie for not preventing an arrest after payment of debt and costs, *Page v. Wiple.* (d) [Abbott C. J. In those cases the plaintiffs in the suits were merely passive, but here *Pilling* was an actor.]

(a) 5 R. & C. 772.

(b) 3 Wils. 368.

(c) 1 Bos. & Pow. 588

(d) 3 East 514.

ABBOTT C. J. It seems to me that *Pilling*, the plaintiff in the suit below, is answerable for the act of *Seddon* his attorney, and that *Seddon* and his agent *Smith* are to be considered as one person. That being so, *Pilling* has signed judgment and taken out execution after the debt was paid, and then, according to the case of *Barker v. Braham* (a), both he and his attorney are liable as trespassers.

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BATES
against
PILLING.

Rule refused.

(a) 3 Wils. 568.

DOE on the demise of MORRIS against
WILLIAMS.

Friday,
November 10th.

EJECTMENT for premises in the parish of *Brilley*, Where *A.* had been tenant of certain premises, and upon his leaving them *B.* took possession: Held, that in the absence of any evidence to the contrary, it might be presumed that he came in as assignee of *A.*, although he never paid rent, and that notice to quit was rightly given to *B.*

in the county of *Hereford*. Plea, not guilty. At the trial before *Burrough* J. at the last Summer assizes for *Hereford*, evidence was given to show that the lessor of the plaintiff was owner of the premises in question, and that the defendant had been his tenant, and paid rent for them. In 1819 the defendant ceased to occupy the premises, and his son-in-law *Wellings* became the occupier. From that time neither the defendant or *Wellings* had paid any rent. Notice to quit was served upon *Wellings*, and when the ejectment was served the defendant entered into a rule to defend as landlord. For the defendant it was objected, that he ought to have had notice to quit. The learned Judge reserved that point, and left the question of ownership to the jury, who found for the plaintiff.

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—
Doe dem.
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against
Williams.

Oldnall Russell now moved to enter a nonsuit on the ground that the defendant *Williams* ought to have had notice to quit. There was not any evidence that *Wellings* ever became tenant to the lessor of the plaintiff; he never paid any rent, or did any other act recognizing *Morris* as his landlord.

BAYLEY J. In *Doe v. Murless* (*a*) it was considered that where it is proved that *A.* is tenant, and that upon his quitting the premises *B.* takes possession, the latter may be presumed to have come in as assignee of *A.* In this case there was no evidence of payment of rent by *Wellings* to *Williams*, or of any other fact tending to rebut that presumption.

Rule refused.

(*a*) 6 M. & S. 110.

*Tuesday,
November 14th.*

KINDER and Another, Assignees of the Estate and Effects of THOMAS SYKES, a Bankrupt, against JOHN BUTTERWORTH.

Where dealings between a trader and his factor continued after the former had committed an act of bankruptcy, and up to the time of issuing a commission: Held,

that the assignees of the bankrupt might recover from the factor all sums of money received by him from the bankrupt within two months before the issuing of the commission, and that the latter could not set off debts incurred by the bankrupt to him during that period, although he did not know of the act of bankruptcy.

ASSUMPSIT for money had and received by the defendant to the use of the plaintiff's as assignees. Plea, the general issue. At the trial before Abbott C. J. at the *London* sittings before Michaelmas term, 1825, the plaintiff obtained a verdict for 849*l.* 19*s.* 8*d.*, which was taken as the aggregate of the sums received from the

bankrupt

bankrupt by the defendant subsequent to the act of bankruptcy, (not arising from the sale of goods consigned by the bankrupt to the defendant,) subject to correction by an arbitrator if necessary. In the ensuing term a rule was applied for to set aside the verdict, when the Court ordered the facts to be stated in the following case :

Thomas Sykes, the bankrupt, carried on the business of a clothier at *Bath Easton*, in *Somersetshire*, and employed the defendant as his broker in *London*. The factorage commenced in the month of *June 1822*, and continued down to the date of the commission of bankrupt issued against *Sykes*, viz. the 26th *June 1823*; during which time there was an open account between *Sykes* and the defendant. *Sykes* was in the habit of accepting bills payable at the defendant's house, and the defendant was in the habit of advancing cash to *Sykes*, and on his account, in taking up such bills and otherwise, and of accepting bills for *Sykes*'s accommodation on the credit of goods in his possession as factor. In his general account with the said *T. Sykes* the defendant debited said *T. Sykes* with the cash so advanced, and with such acceptances, when paid; and he credited *Sykes* with the proceeds of the goods sold, and with monies received on his account, and also with bills received on his account, and when he received the same, without waiting till the same became due. On the 1st of *February 1823*, *Sykes* committed an act of bankruptcy, unknown to the defendant, and he continued to carry on business until the 6th of *May 1823*. On the 1st of *February 1823*, the balance of the said general account, on the face thereof, was *45l. 16s. 5d.* in favour of *Sykes*, although the actual cash balance was

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—
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against
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217l. 14s. 7d. in favour of the defendant; and the defendant was then under acceptances for *Sykes* to the amount of *991l. 14s. 6d.*, which were then in circulation, and the defendant then had in his possession a quantity of cloth belonging to *Sykes*, and consigned by him to the defendant for sale as factor. On the 18th of *April* 1823 the bankrupt appeared, on the face of the aforesaid account, to be indebted to the defendant in the sum of *590l. 9s. 11d.*, but the actual cash balance in favour of the defendant was *944l. 9s. 11d.*, and the defendant was under acceptances for *Sykes* to the amount of *1638l. 4s. 2d.*, and the defendant then also held a quantity of cloth belonging to *Sykes*, consigned to the defendant for sale as factor; which goods were insufficient to repay him such balance and such acceptances. On the 26th of *April* 1823, *Sykes* appeared, upon the face of the aforesaid account, to be indebted to the defendant in the sum of *877l. 7s. 7d.*, but the actual cash balance in favour of the defendant then was *1294l. 8s. 11d.*, and the defendant then was under acceptances for *Sykes* to the amount of *1658l. 18s.*, and the defendant then also held a quantity of cloth belonging to the bankrupt, and consigned to the defendant for sale as factor. All the sums sought to be recovered by the plaintiffs in this action were paid to defendant in cash and bills in the month of *May* 1823, and the particulars of the sums constituting the sum of *849l. 19s. 8d.*, for which a verdict was taken, were as follows: A cheque, being the balance on a bill for *273l. 14s.* accepted by the defendant for the accommodation of *Sykes*, *36l. 1s. 2d.*; another cheque, in part proceeds of a like bill for *300l.*, *200l.*; a cheque for goods, *213l. 18s. 6d.*; a cheque for cash, *400l.* The defendant paid on the

3d May, by the direction of *Sykes*, the sum of 252*l.* 7*s.* on his account, viz. 190*l.* on taking up a bill for that amount, drawn by *Cazenove* on, and accepted by *Sykes*, and made payable at the defendant's house; and 62*l.* 7*s.* for a debt owing by *Sykes* to *Lewin* and Co. On the 26th of June 1823, (the date of the commission of bankrupt,) the balance upon the face of the account was 991*l.* 2*s.* 2*d.* in favour of *Sykes*, but the actual cash balance at that time was 1118*l.* 3*s.* 10*d.* in favour of the defendant, and the defendant was under acceptances for *Sykes* to a large amount: and the defendant then also had in his possession a quantity of cloth belonging to *Sykes*, and consigned to him, the defendant, for sale as factor, which the defendant afterwards sold; and upon making up the account to the time of the trial, the defendant appeared a creditor of *Sykes* for the sum of 991*l.* 8*s.* 6*d.*, after giving credit for all the sums recovered in this action; but in making such balance the defendant took credit for 870*l.* 4*s.* 10*d.*, being the amount of two bills of exchange drawn by *Sykes*, and accepted by the defendant for his accommodation, in favour of *Rickard Edmonds*, and which bills the defendant, before the same became due, had notice not to pay, on the ground of the original consideration for the same being usurious, as the plaintiffs still insist the same to be, but which usury the said *R. Edmonds* and the defendant dispute.

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Campbell for the plaintiffs. The sums of money which the plaintiffs seek to recover in this action clearly belonged to them, as assignees of the bankrupt, *Sykes*. He had no power to pay them away; the payments were not made in the usual course of business, and are

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are not protected by any statute. The plaintiffs are, therefore, clearly entitled to retain the verdict found in their favour.

F. Pollock contrà. By the account kept between the bankrupt and the defendant the estate of the former was not in a worse condition at the time of the issuing of the commission than at the time of the act of bankruptcy; the assignees, therefore, cannot take to it in part and reject the residue. They cannot claim the benefit of payments made by the defendant, without allowing him to retain that which he received. In all former cases, where the doctrine of relation was relied on, the question was raised by an action of trover. By the present form of action the assignees have affirmed the dealing in part. In *Smith and Others, Assignees of Lewis and Potter, v. Hodson* (*a*), goods had been delivered by the bankrupts to the defendant, under circumstances constituting a fraudulent preference; but the plaintiffs brought an action for goods sold and delivered, and it was held, that they had affirmed the act of the bankrupt as to the sale, and that they were liable to any set-off which could have been insisted on as against the bankrupts; for that they could not take to the transaction in part, but must, if at all, take to the sale with all its consequences. Again, in *Ashley v. Kell* (*b*) it was held, that although the future effects of a bankrupt under a second commission might be seized, yet, that until seizure he might sell them to a bona fide purchaser. There is no doubt, that in this case the defendant acted bona fide, for between the time of the

(*a*) 4 T. R. 211.

(*b*) 2 Str. 1207.

act

act of bankruptcy and the commission, he became a creditor to a large amount. With respect to the cheque for 200*l.* on *Brandram*, it appears to have been part of the money produced by the discounting a bill accepted by the defendant for the accommodation of the bankrupt; that sum of 200*l.*, therefore, never was the property of the bankrupt or of his assignees.

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Campbell in reply. Upon the general question *Tompson v. Diggins* (a) is expressly in point. In that case bankers had accepted bills for the accommodation of a trader, who after committing an act of bankruptcy, but before a commission was sued out, lodged money with them to take up the bills, which became due after a commission issued, and were then duly paid; and it was held, that the money so lodged with the bankers was the money of the assignees, and might be recovered by them, and that the bankers neither had a right of set-off under the 5 G. 2. c. 30., nor were protected by the 19 G. 2. c. 32., as having received the money in the ordinary course of trade. Secondly, the plaintiffs are entitled to the whole sum recovered. When the defendant accepted bills for the accommodation of the bankrupt, he enabled him to dispose of the proceeds as he thought fit. The bankrupt thought fit to give a part to the defendant, that clearly was the property of the assignees. These payments to the defendant having been made within two months before the issuing of the commission, were not protected by the 46 G. 3. c. 135. s. 3. The law is in this respect altered by the 6 G. 4. c. 16. s. 50., which gives a right of set-off in the case

(a) 2 Camp. 312.

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of mutual credits, up to the time of the issuing of the commission; but the transactions in question took place before that statute passed.

ABBOTT C. J. I am of opinion that the plaintiffs are entitled to recover the whole sum for which the verdict was found. It is said that the assignees are affirming part of the acts of the bankrupt; but I think, on the contrary, it appears by the facts stated, that they are disaffirming them, in *toto*, so far as by law they may. The form of action does not vary the question; for if the assignees might have brought trover for the cheque in the hands of the defendant, they may recover the proceeds in an action for money had and received. For the defendant it has been argued, that the plaintiffs cannot recover, because the account was not worse at the time of the commission than at the time of the act of bankruptcy; but no authority was cited to show that we could take that into consideration. The case of *Tamplin v. Diggins* is a decisive authority to show, that if all the money had been paid to the defendant at one time, it might have been recovered: and I do not see what difference it makes that the money was paid at several times. With respect to the sum of 200*l.*, the proper answer has been given; the bankrupt had the entire controul over that sum, and he elected to place it in the hands of the defendant. If it had been shown that the bill was accepted, upon the express condition that the defendant should have that part of the proceeds, the case might have received a different consideration, but that was not the fact; and that sum is not to be distinguished from the rest of the demand. The doctrine of relation in bankruptcy, as well as most other general rules,

rules, has operated with severity in some particular instances, and that consideration has probably occasioned the alteration of the law which has been pointed out; but this case must be decided according to the law in force at the time when the money was paid.

Postea to the plaintiffs.

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BUCKERIDGE against FLIGHT.

Tuesday,
November 14th.

(In Error.)

COVENANT on an annuity deed. The defendant below pleaded several pleas. Upon the first three no question arose. The fourth stated, that although the plaintiff within thirty days after the execution of the indenture in the declaration mentioned by certain persons (mentioned in the plea), caused a memorial thereof, and of certain other instruments and assurances for granting and securing the said annuity to be enrolled in the High Court of Chancery as follows: (the memorial was then set out verbatim). Yet the defendant in fact saith, that he did not execute the indenture in the declaration and memorial mentioned until long after the enrolment of the above mentioned memorial, to wit, on, &c. And defendant further saith, that no memorial whatsoever of the indenture was enrolled in the High Court of Chancery within thirty days after the execution of the indenture by the defendant, according to the directions of the statute 53 G. 3. c. 141. Fifth plea, that although the plaintiff within thirty days after the execution of the indenture caused a memorial to be enrolled as follows: (the memorial was then set out, and it

It is not necessary that an annuity deed should be executed by all the parties to it before the memorial is enrolled pursuant to the 53 G. 3. c. 141.
2. 2.

If the names of all the witnesses to the deed are inserted in the memorial, that is sufficient, without specifying the parties by whom the deed was executed in their presence.

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BONAERINUS
against
ELIGER.

appeared that in the column for "the names of witnesses," *D. C.* and *W. W.* were mentioned as witnesses, without specifying any parties whose execution of the indenture they attested). Yet the defendant saith, that he did not execute the indenture in the memorial and declaration mentioned in the presence of *D. C.* and *W. W.*, as in the last mentioned memorial mentioned. Replication to the fourth plea; that a memorial of the indenture in the declaration mentioned was within thirty days after the execution thereof, to wit, on, &c., duly enrolled as follows: (the memorial was then stated in the replication with a prout patet.) And the plaintiff further saith, that the memorial did and does duly contain the date of the indenture, the names of all the parties and of all the witnesses thereto, and of the person for whose life such annuity was granted, and of the person by whom the same was to be beneficially received, and the pecuniary considerations for the granting of the same, and the annual sum to be paid, as required by the statute. Demurrer to the fifth plea, assigning for cause that the averment in that plea, that defendant did not execute the deed in the presence of *D. C.* and *W. W.*, was irrelevant and immaterial. Joinder in demurrer. Rejoinder to the replication to the fourth plea. That defendant did not execute the indenture until long after the memorial was enrolled. Sur-rejoinder, that during the whole of the thirty days next after the execution of the indenture by the defendant, the memorial in the replication mentioned remained and still remains enrolled in Chancery. Demurrer, assigning for cause, that plaintiff hath not traversed the allegation in the rejoinder. Joinder in demurrer. In the court below judgment

judgment was given for the plaintiff, whereupon a writ of error was brought, and the case was now argued by

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BUCKNELL
against
PLANT.

The Solicitor-General for the plaintiff in error. There are two questions in this case; the first, whether it is a material averment, that the party did not execute in the presence of the witnesses named in the memorial? The second, whether the memorial ought to be enrolled after the execution of the deed by the party to be charged? First, the averment is material. The 53 G. 3. c. 141. s. 2. requires that the memorial should state (amongst other things) the date of the instrument whereby the annuity is secured, the nature of the instrument, the names of the parties, and the names of the witnesses. The former statute (17 G. 3. c. 86.) was in the same terms as to this point. The object of the legislature was to avoid frauds, and in order to effect that object a strict construction has been put upon these acts. In *Hart v. Lovelace* (a), where an annuity was secured by various instruments, the execution of which was witnessed by different persons, and the memorial stated those instruments, and that the execution of them was attested by *A., B., C., &c.*, or some of them (naming the several persons who had attested the execution of the several instruments), this was held to be insufficient. The Court then thought that the execution by each person should be fixed, by naming in the memorial the particular witness who attested such execution. [Abbott C. J. It is not stated here that the defendant below executed in the presence of any witness.] It is stated generally in the memorial that the instrument was executed in the

(a) 6 T. R. 471.

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presence of *D. C.* and *W. W.*. That would lead any one to suppose that all the parties executed in the presence of those persons, and if the fact were otherwise the memorial would have a tendency to mislead. Secondly, the memorial in this case was enrolled before the instrument became, as to this defendant, a deed at all. The statute requires that the party should enrol a memorial of the date, i. e. the delivery of the deed. If the party to be charged does not execute until after the enrolment, it cannot be said that he was at that time a party to the deed. If he was not a party until the execution of the deed, the memorial of the execution is false, and does not satisfy the requisites of the statute. If there be any difficulty as to enrolling a memorial when the party is abroad, it is sufficient to answer, that the statute itself creates the difficulty, and that, consequently, it cannot vary the law of the case; but in such a case, the difficulty might be obviated by enrolling a second memorial.

Chitty contrà. There is no averment that the plaintiff in error executed the annuity deed in the presence of any witnesses, it cannot, therefore, be assumed that he did so, and if he did not, the memorial is sufficient. The statute requires that the memorial should state the deed whereby the annuity is secured and the witnesses thereto. That is satisfied by inserting the names of all the witnesses without specifying whose signatures they witnessed, *Orton v. Knight.* (a) Secondly, it was not necessary to enrol the memorial within thirty days after the execution of the deed by the plaintiff in error. If it were, this consequence would follow, that no grant of

(a) *5 B. & P.* 153.

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an annuity could be good if thirty days elapsed between the execution of the deed by the several parties, for the statute does not authorize the enrolment of several memorials. Besides, the deed remained enrolled within thirty days after the plaintiff in error executed.

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The Solicitor General in reply. The allegation in the surrejoinder does not remove the difficulty. If it sufficed, the grantee of the annuity might execute the deed, and then get it enrolled before it had been executed by any other person. Such a course of proceeding would not give to the parties that security and that facility of ascertaining the nature of the transaction which it was the object of the legislature to give.

ABBOTT C.J. I am of opinion that the judgment of the Court below must be affirmed. The question arises on the construction of an act of parliament made for the protection of infants against fraud. The effect of the act, when its provisions are not complied with, is to defeat deeds solemnly executed, and therefore we ought not in our construction to go beyond the words of the enactment. The point in this case depends upon the sufficiency of a memorial. On a view of that instrument, and referring to the words of the statute, I think it contains all that is required by the legislature. It is not required that there should be a memorial *of the transaction*, but of the instrument whereby the annuity is granted and secured. A form of this memorial is given, in which there is a column for the date of the instrument, that must mean the day inserted in the instrument as the date, and not the day on which it is executed. For if there are several parties it can seldom

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happen that all will execute the deed on the same day. It also requires that the memorial should specify all the parties to the deed. It is contended that no person is a party within the meaning of the statute until he has executed the deed. It is true that he is not until that time a party chargeable, but still he may be a party; and I take the expression in the statute to mean all such persons as upon reading the deed appear to be parties. The same construction must, I think, be given to the expression "all the witnesses thereto," as was held in the case of *Orton v. Knight*. That indeed was an extremely strong case, for the memorial affected to specify the signatures attested by the witnesses, and did it incorrectly, and yet the memorial was held to be sufficient.

Then as to the second point, it appears that the defendant, who became a surety, had not executed the deed at the time when the memorial was enrolled, and if he had afterwards executed in the presence of a subscribing witness, not being one of those who attested the other signatures, a second memorial might have been necessary. If the legislature meant to require that the execution of an annuity deed by every person to be charged therewith should be attested, there should have been a distinct provision to that effect. In one instance the legislature has specially required the name of a party, viz. of the party beneficially interested, to be inserted both in the deed and in the memorial. I therefore think, that if it had been intended to require that the execution by each party should be attested by a witness, that would have been specially stated in the act. As it is not, it seems to me that this memorial contains all that the statute makes requisite, and that it is immaterial

whether

whether the deed was enrolled before or after the execution, as that does not alter the nature of the instrument.

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BAYLEY J. I think that the enrolment of the memorial in the form and at the time mentioned in these pleadings was a sufficient compliance with the act. If an annuity deed be enrolled within the time specified, and the enrolment contains the date of the instrument and the other particulars pointed out by the statute, all the information which the legislature seems to have intended to provide will be given, whether the deed has or has not at that time been executed by all the parties. If any subsequent part of the transaction renders an addition to the memorial requisite, that must be made within thirty days after the execution of the instrument. The objection as to the witnesses at first appeared to be entitled to more weight, for if the execution by various persons be attested by various witnesses, and they are all inserted indiscriminately as witnesses to the execution of the deed, that may be turned to purposes of concealment. But looking at the language of the statute and the form of the schedule annexed to it, I think that the entry of the names of the witnesses in this manner is sufficient. The case of *Orton v. Knight* is a very strong authority upon this point, and it was recognized and adopted in the subsequent case of *Brown v. Rose*. (a)

HOLROYD J. I entirely agree upon both points. Where acts of parliament vary or take away the rights of parties they ought to be strictly construed.

(a) 6 *Taunt.* 124.

CASES IN MICHAELMAS TERM

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LITTLEDALE J. It was the intention of the legislature that the memorial should give information as to certain particulars, and that is equally given whether the execution of the instrument precedes or follows the enrolment. The deed must, of course, in either case be conformable to the enrolment.

Judgment affirmed.

Tuesday,
November 14th.

SHAW and Others, Assignees of the Estate and Effects of E. HOWARD and J. GIBBS, Bankrupts, *against* DARTNALL.

A. was the agent of the grantor and the grantee of certain annuities; all payments on account of the annuities passed through his hands, and he charged the grantee a commission upon all such payments. A. delivered to the grantee an account, and gave him credit for half a year's annuity, describing it "as money not yet received," and debited him with commission upon the same. In fact, it had not been received by A., and he having afterwards become bankrupt, it was held, that his assignees were entitled to be allowed that sum in account by the grantee.

So, where in one account credit was given to the grantee for certain sums, as money actually received by A., and they had never been received; and in another account subsequently delivered, the same sums were placed to the debit of the grantee *with his assent*, it was held that the assignees of A. were entitled to be allowed those sums in account.

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an account in the names of both, and entered on the credit side of the accounts of the grantees, and on the debit side of the account of the respective grantors, the instalments of the annuities from time to time, but not always at the precise periods when they became due. To the grantees of annuities the bankrupts also delivered pass-books, which pass-books generally contained a copy of the grantee's account in the ledger, varying only as to the rests; the pass-book being balanced at the time it was left with the bankrupts, and no notice whatever being taken of any balance that might have been previously struck in the ledger. An account was kept in the bankrupt's ledger (in the manner described) of the annuities which the defendant had purchased, with but one exception, and a pass-book was in like manner delivered to the defendant, and made up from time to time from the ledger, but varying from it in some particulars, which will be mentioned hereafter. No accounts were settled between the bankrupts and defendant, except by the making up of the pass-book, and striking balances therein in the manner above mentioned. Acts of bankruptcy were committed by *Howard* and *Gibbs* on the 10th of *January* 1821. The commission was dated the 22d day of *August* in the same year. The alleged balance of 846*l.* 19*s.* 1*d.*, which the plaintiffs sought to recover, arose upon the account stated in this pass-book, by withdrawing from the credit side certain instalments of annuities granted to the defendant by *H. M. Goold*, the Marquis of *Wellesley*, and the Duke of *Marlborough*, which instalments had never been received by the bankrupts from the grantors of these annuities. The circumstances respecting these annuities are as follow:

First, in respect of *Goold's* annuity; prior to the year

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1815 *Goold* had granted several annuities to different persons, for whom the bankrupts were agents, and the accounts of such annuities were entered in the ledger of the bankrupts in the manner before described. In some of these annuities the bankrupt *Howard* was a trustee, and in others the bankrupt *Gibbs*. These annuities were secured on certain estates belonging to *Goold*, in *Ireland*, of which estates the bankrupts, prior to the year 1815, had been appointed receivers. The rents of the estates in *Ireland* were not sufficient to discharge the annuities secured thereon prior to the year 1815. In January 1815 the defendant, through the agency of the bankrupts, became the purchaser of an annuity from *Goold* of 216*l.*, the consideration money for which was 1400*l.* This annuity was secured on *Goold's* estate in *Ireland*. An account was opened in the ledger of the bankrupts, in the names of the grantor and grantee; and from the time such annuity was granted, down to the 4th day of *May* in the year 1820, the grantor was regularly debited, and the grantee credited with this annuity from time to time, though not always at the precise periods at which it became due. The grantee was regularly debited with a commission of two and a half per cent., and stamps for receipts upon every credit that was given to him for the annuity. Balances were from time to time struck in the ledger and the pass-book, after the defendant was credited with the instalments of this annuity. The pass-book made up by the bankrupts and delivered to the defendant, contained all the items, both on the credit and debit side of the grantee's account in the ledger, though not exactly corresponding as to date; but with this distinction, as to the last item on the credit side, of the 4th day of *May*, in the year

1820,

1820, the entry in the pass-book was as follows : " *May 4th, 1820. By H. M. Goold's one year's annuity, due 11th of January last (not yet received) 144.*" In the ledger the words " not yet received" were omitted. In both the pass-book and the ledger the defendant was debited with the commission on this sum. Statements of the arrears of the annuity were delivered by the bankrupts to the grantor, after the instalments had been credited to the grantee in the bankrupt's ledger and pass-book. In the year 1817 *Goold* took the benefit of the insolvent act, prior to which the usual notice was given to the defendant, as one of the creditors. The plaintiffs sought to withdraw from the credit side of the defendant's account in the ledger and pass-book all the instalments of this annuity, with which he had been credited from the time it had been granted, withdrawing at the same time from the debit side of the account all the charges for commission and stamps with which he had been debited at the time such instalments had been credited. The bankrupts had not received from *Goold* or his estate any of the sums of money with which they had credited the defendant on account of this annuity.

Secondly, in respect of the Marquis of *Wellesley's* annuity. The bankrupts received the instalments of an annuity of 151*l.*, which had been granted to the defendant by the Marquis of *Wellesley* in the year 1812. The account of this annuity was kept in the bankrupts' ledger, in the names of the grantor and grantee, and the grantee was regularly credited, and the grantor debited with the instalments of the annuity. The grantee was also debited with a commission of 2*½* per cent. and receipt stamps, on all instalments with which he was credited.

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credited. The pass-book in respect of this annuity contained the same debits and credits as the ledger. In the pass-book on the debit side, under the date of the 4th day of *May* 1820, there was the following entry contained also in the ledger: "To Marquis *Wellesley*, 1½ year's annuity due 7th *September* 1818, 188*l.* 15*s.*;" and on the credit side, the following entry also contained in the ledger: "By commission ret. on 188*l.* 15*s.*, 4*l.* 7*s.* 4*d.*" These were the last items of any description either on the debit or credit side of the pass-book. A balance was then struck, making the defendant a debtor to the amount of 238*l.* 14*s.* 1*d.* Of this sum of 188*l.* 15*s.* (being the amount of five quarterly payments of Lord *Wellesley's* annuity), so carried to the debit of the defendant's account, the defendant had been credited with one quarter in *June* 1816, and debited with the commission and stamps thereon; he had been credited with one half yearly payment in *April* 1818, and debited at the same time with commission and stamps thereon; and he was credited with the remaining half yearly payment in *November* 1818, and debited at the same time with commission and stamps. A balance was struck in the pass-book after the entry of each of these credits. The bankrupts had not received this sum of 188*l.* 15*s.* from the grantor of the annuity. The instalments of this annuity with which the defendant had been credited prior to the year 1816, had been received by the bankrupts from the Marquis of *Wellesley*. On the 17th day of *July* 1821, the defendant filed a bill against the Marquis of *Wellesley* in the Court of Chancery in *Ireland*, in which bill he claimed as due to him from the Marquis of *Wellesley*, on the 7th day of *September* 1820, twelve quarterly payments of this annuity of 151*l.*,

and

and in an affidavit made by the defendant in the same cause, in the Court of Chancery in *Ireland*, on the 15th day of *March* 1822, the defendants swore that on the 7th day of *September* 1820, twelve quarterly payments of this annuity were due and owing to him from the Marquis of *Wellesley*. The plaintiffs sought in this action to withdraw from the credit of the defendant's account this sum of 188*l.* 15*s.*, after deducting therefrom the commission and stamps with which the defendant had been debited.

Thirdly, In respect of the Duke of *Marlborough's* annuity. In *January* 1818 the defendant, through the agency of the bankrupts, became the purchaser of an annuity of 200*l.* from the Duke of *Marlborough*, the consideration money for which was 1200*l.* An account was opened in the ledger of the bankrupts, in the names of the grantor and grantee. In the pass-book, the defendant was debited on the 10th day of *January* 1818 with the purchase money, 1200*l.*; and on the 16th day of *June* 1818, with the insurance of the Duke of *Marlborough's* life, 58*l.* 12*s.* 3*d.* Both these items were entered in the bankrupts' ledger, but it contained no further entries respecting this annuity. In the pass-book the defendant was credited on the 21st day of *August* 1818, with one half yearly payment of this annuity, due on the 10th day of *July*, 100*l.*, and was debited on the same date with commission of $2\frac{1}{2}$ per centum on this sum and receipt stamps. On the same date, after this entry, a balance was struck in the pass-book. Under the date of the 13th day of *November* 1818, this same half-yearly payment of 100*l.* was carried to the debit side of the defendant's account, and the commission thereon and stamps under the same date were placed to his credit.

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credit. On the same date, after this entry, a balance was struck in the pass-book. The pass-book contained a few entries on the debit and credit side, after these of the 19th day of *November 1818*. A balance was struck on the 19th day of *March 1819*, and on the 4th day of *May 1820*, a balance was again struck, making the defendant a debtor to the amount of *238l. 14s. 11d.* This balance was the last entry of any description in the pass-book. The bankrupts did not receive from the Duke of *Marlborough* the half year's annuity of *100l.* which they originally credited the defendant with. The plaintiffs sought to withdraw this sum from the credit side of the account, after allowing for the commission and stamps which the bankrupts had debited the defendant with on account of this instalment.

Scarlett for the plaintiffs. As to *Goold's* annuity, it must be conceded that, according to the rule laid down in *Shaw v. Picton (a)*, the plaintiffs cannot claim to recover any sums for which the bankrupts gave the defendant credit as monies actually received by them; but that does not apply to the sum of *144l.* which the bankrupts in the pass-book stated to be "not yet received." As to that sum there was express notice to the defendant that it was not paid to the bankrupts out of any funds of *Goold's* in their hands. The bankrupts did not hold out to the defendant that they had received it, nor could the defendant be misled by their act.

As to the Marquis *Wellesley's* annuity, the bankrupts at one time had given credit to the defendant for *188l. 15s.* as money received by them for him on ac-

count of that annuity. They afterwards debited him with that sum, and he returned the pass-book to them without objecting to the sum so placed to his debit. He thereby admitted that that sum was properly placed to his debit. So far from making any complaint, he proceeded against the grantor of the annuity, and made an affidavit that he, the grantor, was indebted to him for these sums. He therefore acquiesced in the account delivered by the bankrupts, and must be bound by it.

Then as to the Duke of Marlborough's annuity, one half year's annuity had been placed to the defendant's credit in *August 1818*. On the 13th *November* it was carried to his debit. A balance was afterwards struck three times, the half year's annuity always continuing to his, defendant's, debit. It is not competent to him, after having given his assent to this money being charged to his debit, now to say that it was improperly placed to his debit.

Taddy Serjt., contrà. The bankrupts were not merely agents of the defendant for the purpose of receiving the instalments of the annuities, but they were agents acting under a *del credere* commission. The contract between the bankrupts and the grantees of the annuities was, that the former should guarantee the payment of them; and if that be the true nature of the contract between them, then the instalments, as soon as they became due from the grantors of the annuities, constituted a debt from the bankrupts to the grantees, and the relation subsisting between the bankrupts and the grantees being that of debtor and creditor, cannot be affected by the mode in which the accounts were kept between them. Now that that was the nature of the contract may be fairly collected

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collected from the facts stated upon the award, for the bankrupts in the first instance procured the annuities for the grantee, and they charged a commission upon the half-yearly instalments, as if they had actually received them. [*Bayley J.* If that were the contract the bankrupts would have given the defendant credit for the half-yearly instalments on the very days when they became due. They, however, gave him credit for the instalments, not on the days they became due, but at subsequent periods.] Assuming that the bankrupts acted as mere agents of the grantee, still the plaintiffs are not entitled to withdraw these sums from the credit side of the account. First, as to the sum of 144*l.* in respect of *Goold's* annuity, it does not appear when the words "not yet received" were written in the pass-book; but, at all events, that sum stood to the credit of the defendant in the ledger from *January* till *May*, and during that time he had no notice that it had not been paid to the bankrupts. Then as to the sums for which credit was in the first instance given to the defendant in respect of the annuities granted by the Marquis *Wellesley* and the Duke of *Marlborough*, a settlement of accounts took place, and a balance was struck while those sums stood to his credit; and when that account was settled, and the balance agreed upon by both parties, it was the same thing in point of legal effect as if that balance had been actually paid by the bankrupts to the defendant; and if it had been paid, it is quite clear that the bankrupts or their assignees could not recover it back again. [*Bayley J.* Assuming that to be so, then upon the same principle when upon a representation made by the bankrupts that they had not actually received the money for which they had given the defendant credit, he assented to that money being again

again placed to his debit, that would be the same thing in point of legal effect as if he had actually returned the balance to them ; and if he had so done, that would have been a voluntary payment on his part, and he could not recover it back again.] The defendant only seeks to retain that which he has.

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ABBOTT C.J. I am of opinion that the defendant is entitled to retain all the sums entered in the books to his credit in respect of *Goold's* annuity, except the last sum of 144*l.*, entered to his credit of the date of the 4th *May* 1820. I think he is entitled to retain all the other sums for the reasons given by the Court in the case of *Shaw v. Picton* (*a*), viz. that the bankrupts by giving him credit for those sums led him to suppose that they had received them, and that they cannot, therefore, be allowed to say that they had not. I think that the sum of 144*l.*, entered as received on the 4th *May* 1820, is not to stand to his credit by reason of the special terms in which that entry is made. It is entered as a sum not yet received. The effect of that entry is much the same as if the bankrupts had said in express terms, "We give you credit from *May* for the sum of 144*l.*, in expectation that we shall receive it hereafter," and in that view of the case the assignees are clearly entitled to withdraw that sum.

With respect to the sum originally credited to the defendant in respect of the Marquis *Wellesley's* annuity, if the case had stood alone on that entry in the book in which the entire sum of 188*l.* 15*s.*, making five quarterly payments, is placed to his the defendant's debit, I should have

(*a*) 4 *B. & C.* 715.

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thought that would not have been sufficient to entitle the assignees to debit him with that sum, because it seems to me that it was necessary to show his specific assent to that entry and to the debit thus made to him. But there is abundant evidence in this case to show, that the greater part of that sum was placed to his debit with his assent, because we find that on the 17th of *July* 1821, when he must have known that this sum had been placed to his debit, he files his bill in chancery against the Marquis *Wellesley*, and exhibits an affidavit in support of it, in which he states that the Marquis *Wellesley* was indebted to him for four of these five quarterly payments. I think that that does show his acquiescence in that entry *pro tanto*, but it applies to four quarterly payments only, and they amount to 15*l.*

As to the sum of 100*l.* in respect of the Duke of *Marlborough's* annuity, I think that the defendant would be entitled to retain that sum, for the same reason that he is entitled to retain the sums in respect of *Goold's* annuity, unless there was evidence of his assent to its being replaced to his debit. The entry is "half a year's annuity, due the 10th of *July*, returned 100*l.*" The evidence of his assent to that entry is this, that on the 13th of *November* 1818 the account is made up, and a balance of 48*l.* 15*s.* 9*d.* struck. In *March* 1819 another account is made up and a balance struck, and the sum of 100*l.* continuing debited to him. I do not rely upon the ultimate balance struck on the 4th of *May* 1820, because there was no distinct evidence of the defendant's assent generally to the whole contents of the entry of that date. But, on the ground that there was a previous assent by him to that entry when the two settlements of accounts

accounts took place, I am of opinion that that sum was properly placed to his debit, and must be allowed.

It has been argued, that looking to the whole transaction, we must see that the bankrupts became guarantees for the payment of all these annuities; but looking at all these entries, I cannot draw that conclusion from them, because, on the supposition that they had become guarantees, I cannot account for the defendant's consenting to the entry of the return of that 100*l.*, nor can I account for the affidavit made by him, in which he states that the Marquis *Wellesley* was indebted to him for these annuities, nor can I account upon that principle for another act done, not indeed by the defendant, but by the bankrupts, viz. their entering the last sum respecting *Gould's* annuity as money *not yet received*. Looking to the whole of these entries, the conclusion which I draw from them is, not that the bankrupts had guaranteed the payment of all the annuities, but that they were willing from time to time to make the defendant believe that the annuities had been paid into their hands to induce him to continue his dealings with them. I think, for these reasons, the plaintiffs are entitled to withdraw from the credits given by them the sum of 144*l.* in respect of *Gould's* annuity, and the sum of 151*l.* on account of the Marquis *Wellesley's* annuity, and the sum of 100*l.* in respect of the Duke of *Marlborough's* annuity.

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Postea to the plaintiffs.

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The KING against The Inhabitants of CRAYFORD.

A house of the annual value of 10*l.* was hired by A. at Michaelmas 1824, and he died three days before the year expired, but his corpse continued in the house after the expiration of the year, and after his death his widow resided there, and paid the year's rent: Held, that A.'s widow and children did not gain any settlement.

UPON appeal against an order of two justices, bearing date the 22d of November 1826, whereby S. Stone, widow of T. Stone, and their six children, were removed from the parish of *Bexley*, in the county of *Kent*, to the parish of *Crayford*, in the same county, the sessions confirmed the order, subject to the opinion of this Court on the following case:

In the month of September 1824, *Thomas Stone*, the husband of the pauper, was settled in the parish of *Crayford*. At *Michaelmas*, in the same year, he hired a house situated in the parish of *Bexley* for a year, at the rent and of the annual value of 12*l.* He took possession of the house on *Michaelmas-day*, the 29th September, 1824, and continued to live in the same till the 26th day of *September* 1825, when he died. His body remained in the house till the 30th of the same month, when it was buried. The rent for the first three quarters of the year was paid by him, and for the last quarter, ending on the 29th day of *September* 1825, by his widow, the pauper. The pauper continued in the house till she was removed under the order, and paid the rent thereof up to the 25th *December* 1825. The question was, whether the pauper and her children, under the above circumstances, were entitled to settlements in the parish of *Bexley*.

D. Pollock, in support of the order of sessions, contended that no settlement was gained in the parish of *Bexley*,

Berkeley, because there was neither a payment of rent nor a holding of the house for the term of one whole year by the person hiring the same, as required by the statute 59 G. 3. c. 50.

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Bolland contrà. In this case a year's rent has been actually paid, and the house has been held for one whole year by the persons who claim a settlement. The provisions, therefore, of the act of parliament have been substantially complied with. It is true that the statute requires that the rent shall be paid, and that the house shall be held by *the person hiring the same*. Those words are not to be construed strictly; and, giving them a liberal interpretation, there was a sufficient holding or occupation of the house by the husband for one whole year; for although he died three days before the year expired, yet decency required that his corpse should continue beyond the expiration of the year in the house. During that period, therefore, there was an occupation or holding by him within the meaning of this act of parliament.

BAYLEY J. The safest rule to adopt in these cases is to adhere to the words of the act of parliament. Those words are, "that no person shall acquire a settlement by reason of his dwelling for forty days in any tenement rented by such person, unless such tenement shall consist of a house or building, being a separate and distinct dwelling-house or building, or of land, or of both, bona fide hired by such person at and for the sum of 10*l.* a year at the least for the term of one whole year; nor unless such house or building shall be *held*, and such land occupied, and the rent for the same actually paid for the term of one whole year at the

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least by the person hiring the same." In order to gain a settlement, therefore, the house must be held for one whole year by the person hiring the same. Now here the husband was the person who hired the house, and he died three days before the year expired; and consequently he did not hold it for one whole year; he, therefore, gained no settlement by the renting of this tenement. Assuming that the widow might be considered to have held this house for a year, she was not the person who hired it, and therefore gained no settlement.

Order of sessions confirmed.

*Wednesday,
November 15th.*

The KING *against* The Churchwardens and Overseers of the Poor of the Parish of KENARDINGTON.

It is not necessary to the gaining a settlement by coming to settle upon a tenement, that the pauper should reside upon any part of it.

UPON an appeal against an order of two justices for the removal of *William Knight*, and *Sarah* his wife, and their eight children, from the parish of *Kenardington* to the parish of *Ulcomb*, both in the county of *Kent*; the sessions quashed the order, subject to the opinion of this Court upon the following case:

The pauper, *William Knight*, when about sixteen years of age, hired himself for a year to *T. Knight* at the wages of four guineas; he served the year in the parish of *Ulcomb*, dwelling in his master's house there, and received his wages. He afterwards, and about twenty-two years ago, married *Sarah* his wife, and having about four years after his marriage removed to *Kenardington*, he entered into a contract with *Joseph Stead*,

Stead, a farmer there, to serve him as a labourer upon his farm at the wages of 16s. a week, to have his wheat at 6s. a bushel, butter at 1s. a pound, and a small house of his master's, situate in his master's farm, rent free, to live in. He entered into the service, and continued in it under these terms for three years, and between *Christmas* and *Lady-tide* in the third year of his service with *Stead*, the pauper, with two other persons, hired of *Joseph Boon* seven acres and a quarter of land in the parish of *Kenardington*, at the price and of the value of 25*l.* 7*s.* 6*d.*, being 9*l.* 10*s.* per acre, and at the same time he, on his own account, took an acre of land in the same parish of *Joseph Boon* at the price and of the value of 50*s.* The seven-acre piece was cultivated and cropped with potatoes, and the expences and the rent for the same were paid equally by the pauper and his two partners; but the one acre piece was cultivated and cropped with potatoes by and at the sole expence of, and rent for the same was paid by, the pauper alone; thereby making his renting in the parish of *Kenardington* at one time 10*l.* 19*s.* 2*d.*, and these two parcels of land were held together by the pauper, and by the pauper and his partners six months. The pauper at no time resided on any part of the land taken of *Joseph Boon*, but resided in the small house of his master's, on his master's farm, as his servant. At the end of the three years he quitted *Stead*'s employment, and at the same time left his house.

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wardens of
KENARDING-
TON.

Bolland and *Brodrick* in support of the order of sessions. In the case of *Rex v. Bardwell* (a), the Court,

(a) 2 B. & C. 161.

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wardens of
KINARDING
TOWN,

for the first time, gave an opinion that a settlement could not be gained by renting a tenement, unless the pauper resided upon some part of it. Many cases are cited in a note to that decision, by which it appears that the Court had, until that time, confined themselves to the inquiry, whether the pauper resided in the parish where the tenement rented was situate. In *Rex v. Minster* (a), and *Rex v. All Saints, Derby* (b), the pauper gained a settlement by renting a tenement upon which he did not reside, and in *Rex v. Benneworth* (c), the Court appear to have reconsidered their judgment in *Rex v. Bardwell*, and to have abandoned the opinion there expressed. If it were well founded, it would follow that no settlement can be gained by renting a tenement unless there is a house upon it.

Nolan and *D. Pollock* contra. The single question is, whether a person hired as a servant, and living in a parish as a servant, can gain a settlement there by renting a tenement. The statutes 13 & 14 Car. 2. c. 12. make those persons alone irremovable who come to settle upon a tenement of the annual value of 10*l.* There is great reason to suppose that the legislature by settlement intended residence upon a tenement, but, at all events, to be within the exception in the statute, the party must come to reside in the parish *as a tenant*; in this case he came to reside as a servant, not as a tenant, and, therefore, did not gain a settlement.

BAYLEY J. I am of opinion that the order of sessions was right, a settlement having been gained in *Kinard-*

(a) 3 M. & S. 276.

(b) 5 M. & S. 90.

(c) 2 B. & C. 775.

ington.

ington. The argument against the settlement is, that although the pauper rented a tenement of more than 10*l.* annual value, yet, as he did not reside upon any part of it, but with a master, no settlement was gained. In *Rex v. Bardwell*, expressions were certainly used by *Best J.* and me, giving a larger meaning to the words *coming to settle*, in the 13 & 14 Car. 2. c. 12., than we ought to have done ; and *Rex v. Shipdem (a)* was decided on the same ground. In *Rex v. Benneworth* the Court took time to consider the question, because they were pressed with the former decisions, and reconsidered them. The point is not mentioned in the judgment pronounced in *Rex v. Benneworth*, but that judgment could not have been given if the Court had been of opinion, that *Rex v. Bardwell* and *Rex v. Shipdem* were well decided. In *Rex v. Sutton St. Edmunds (b)*, it appeared that the pauper entered into a service where he was to have 18*l.* a year wages and the keep of two cows. He lived in a cottage on his master's farm, but it was found that the occupation of the cottage was incidental to his service. The Court held, that he did not gain a settlement, because there was no bargain that the cows should be pasture fed. If the Court had then thought residence upon the tenement necessary, the case would not have admitted of an argument, and the other point would not have been made the ground of the decision. In *Rex v. All Saints, Derby*, there could not be any residence on the tenement, and yet a settlement was

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ton.

(a) This case came on for argument the day after *Rex v. Bardwell* had been decided ; and inasmuch as it appeared that the pauper had not resided upon any part of the tenement which he rented, but lived in the house of a person to whom he was hired as a servant, the Court held, that no settlement had been gained.

(b) 1 B. & C. 536.

gained.

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gained. In *Rex v. Benneworth*, also, there was no residence on the tenement, and the renting of the tenement was during the service. It can make no difference, whether the bargain for the tenement is connected with the contract for service, or whether, as in this case, it is a separate contract made with a third person.

LITTLEDALE J. concurred.

Order of sessions confirmed. (a)

(a) Holroyd J. was in the Bail Court.

Wednesday,
November 15th.

The KING against MUSSON.

The justices of a borough had exclusive jurisdiction within the borough itself, but jurisdiction concurrent with that of the county justices over certain places called the liberties of the borough: Held, that for an offence committed within the liberties they might commit the prisoner to the county gaol, and cause the prisoner to be brought before them for trial at the borough sessions.

INDICTMENT against the defendant, as keeper of the gaol for the county of Leicester, for a misdemeanor, in refusing to deliver up to John Brooks, one of the constables of the borough of Leicester and the liberties thereof, pursuant to an order of the court of quarter sessions of the said borough and liberties then sitting, one Mary Lovett, then in the defendant's custody in the said gaol, for the purpose of the said Mary Lovett being conveyed by the said John Brooks to the said court of quarter sessions of the said borough and liberties, there to take her trial upon a bill of indictment for felony found against her. Plea, not guilty. At the trial before Holroyd J. at the Leicestershire Summer assizes, a verdict was taken for the crown, subject to the opinion of this Court, upon a case similar to that stated in *Rex v. Amos* (b), with the following exceptions. In the present case it appeared, that the borough of Leicester now extends into six parishes,

(b) 2 B. & A. 533.

St. Martin's,

St. Martin's, St. Nicholas, All Saints, St. Margaret's, St. Mary's, and St. Leonard's. Over the first three, which are entirely within the ancient borough, the borough magistrates have exclusive jurisdiction. Parts of the latter three are situate within the liberties of the borough, and over those parts the borough and county magistrates have concurrent jurisdiction. Jurisdiction over those parts was given to the borough by a charter of Queen *Elizabeth*, which contained a saving to all persons of such privileges, pre-eminent, and jurisdictions, as they had before the granting of that charter. The felony for which *Mary Lovett* was indicted, was alleged to have been committed in that part of the parish of *St. Margaret* which is subject to this concurrent jurisdiction. There is a rate in the nature of a county rate for those parts of the borough where the borough justices have exclusive jurisdiction. The inhabitants of those parts do not contribute to the general county rate, but the inhabitants of the liberties contribute to that rate, and not to the borough rate. The case was argued by *Goulburn* for the crown, and *Reader* for the defendant, who endeavoured to distinguish this from *Rex v. Amos* (a) on two grounds; first, that if the borough magistrates could at their sessions try offences committed in the liberties, and for which the party accused had been sent to the county gaol, the county justices would be ousted of their jurisdiction, for that they could not assist at the borough sessions where the borough magistrates have exclusive jurisdiction. That before the charter of Queen *Elizabeth*, the county magistrates had the exclusive right to try persons accused of felonies committed in the county; and that their pre-eminent

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(a) 2 B. & A. 533.

and

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1826. and privileges were expressly reserved by the charter. In *Rex v. Amos*, the borough magistrates had no exclusive jurisdiction. Secondly, that if the borough magistrates could try, they might make an order for payment of costs out of the county rate to which they did not contribute.

The *Court* held, that those circumstances did not make any substantial difference between this case and *Rex v. Amos*.

Judgment for the crown.

Friday,
November 17th.

MOORE against STOCKWELL.

Where a party held to bail obtains time to put in bail to the action, he cannot afterwards object to the writ for irregularity.

THE defendant was arrested and held to bail on a latitat returnable on *Thursday* next after three weeks of the *Holy Trinity* (the day next after the end of *Trinity* term). The defendant, after the return day of the writ, took out a summons for time to put in special bail, and the plaintiff thereupon consented to allow a week for that purpose. Special bail not having been put in, the plaintiff took an assignment of the bail-bond, and commenced an action upon it. A rule had been obtained to set aside the latitat for irregularity, to stay the proceedings on the bail-bond, and to have that instrument given up to be cancelled.

Follett showed cause, and contended, that the defendant, by obtaining time to put in bail to the action had waived the objection to the writ.

Platt,

Platt, contrà, contended, that the writ being returnable on a day out of term was altogether void, and not a mere irregularity; and he cited the case of *Kenworthy v. Peppiat* (*a*), where it was held, that a writ returnable on a dies non was void, and could not be amended by the Court.

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Per Curiam. This was a mere irregularity, and was waved by the defendants having taken out a summons to put in and justify bail.

Rule discharged. (*b*)

(*a*) 4 B. & A. 288.

(*b*) In an action on a bill of exchange the plaintiff had filed a bill against the defendant as an attorney, when in fact he was not an attorney. The bill was filed on the 8th of April 1826, and the defendant was served with a copy on the same day. There was a rule to plead and a demand of a plea on the 18th, and judgment for want of a plea was signed on the 22d of April, and a copy of the rule to compute principal and interest was served on the 23d of April. A rule having been obtained on the 2d of May for setting aside the proceedings, on the ground that they were absolutely void, and not merely irregular: the Court, after hearing *Platt* in support of the rule, and *Comyn* contrà, held that the proceedings were not void, but irregular, and that the defendant was too late to take advantage of the irregularity. *Paul v. Garry, Trinity term, 7 G. 4.*

The KING against The Inhabitants of
WARMINSTER.

Saturday,
November 18th.

UPON appeal against an order of two justices, a week for the whereby *W. Mould* and his wife and children were winter and 9s. removed from the parish of *Heytesbury*, in the county of summer, nothing being Wiltshire, to the parish of *Warminster*, in the same county, said as to the duration of the the service, is not a yearly hiring.

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 against
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 ants of
 WARMINSTER.

the sessions confirmed the order, subject to the opinion of this Court on the following case:

The pauper was born a bastard in the parish of *Font-hill Gifford*, in the county of *Wilts*. When about twenty-five years of age he hired himself to Mr. *J. Thring*, a solicitor, of *Warminster*, as gardener. At the time of the hiring Mr. *Thring* asked the pauper what he should give him a week; the pauper asked 20*l.* a year wages, which Mr. *Thring* refused to give, but said he would give 6*s.* a week for the winter, and 9*s.* a week for the summer, which the pauper agreed to take. He was to be in Mr. *Thring's* house. Under this hiring the pauper served more than a year, living in the house. He and his master then came to a fresh agreement for weekly wages without board; and about a week afterwards, Mr. *Thring*, upon detecting some irregularities among his servants, discharged the pauper without notice. Mr. *Thring* made at the time, in a book kept for that purpose, entries of the several facts as they occurred, which were as follow; “*William Mould* agreed with him as a gardener, into house, at 6*s.* a week in the winter, and 9*s.* a week in the summer. Came *Monday, 2d November 1818*. Agreed with him *6th November 1819* (which was a *Saturday*) to give him 8*s.* a week winter, and 9*s.* in the summer. *4th of July 1820*, went out of house as labourer at 18*s.* per week, and left my service shortly after.” During the service under the first hiring, the pauper on one occasion gave his master a month’s notice of his intention to quit, but the notice was not acted upon. The wages were accounted for weekly, but paid occasionally as they were wanted and applied for by the pauper. The question was, whether there was a hiring for a year in *Warminster* or not.

Bingham

Bingham in support of the order of sessions. The hiring in this case was general, and not for any definite period; it was, therefore, in contemplation of law, a yearly hiring. The provision for certain wages in winter and a larger sum in summer, shows that the parties intended that the service should continue throughout the year. The stipulation for weekly wages is not sufficient to rebut this; and the fact of the servant's being admitted to live in the house of the master is a circumstance to explain the nature of the contract; for it cannot be presumed that a person in the master's station would allow a weekly servant to live in the house.

Merewether, contra, cited *Rex v. Dedham* (a), *Rex v. Pucklechurch* (b), and *Rex v. Dodderhill*. (c)

ABBOTT C. J. Those cases are directly in point; but without them there is sufficient in this case to show, that the master never intended to hire the pauper for a year. To a question asked by him, as to the wages which the pauper expected per week, the latter replied, 20*l.* a year. The master refused to give that, but offered a certain weekly sum, which the pauper accepted. That clearly negatives the supposition that a yearly hiring was intended.

Order of sessions quashed.

(a) *Burr. S. C.* 653.

(b) *5 East*, 382.

(c) *3 M. & S.* 243.

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against
The Inhabit-
ants of
WARMINGSTON.

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Saturday,
November 18th.

Ex parte MARTIN.

Where a single woman, having been delivered of a bastard child, was committed by one justice of the peace for refusing to answer inquiries as to who was the father of the child: Held, that the commitment was bad.

A WRIT of habeas corpus had been granted to bring up the body of *Mary Ann Martin*, who was confined in the house of correction at *Petworth*, in the county of *Sussex*. By the return, it appeared that she was so confined pursuant to the following warrant, signed by one justice of the peace. "Whereas information and complaint have been made unto me, one of his majesty's justices, &c., by *E. G.*, clerk to the guardians of the poor of the city of *Chichester*, that *M. A. Martin*, of the parish of *Pancras*, in the county aforesaid, single woman, hath lately been delivered of a bastard child in the said parish, which said child was likely to become chargeable to the said parish, and that she the said *M. A. M.* had refused, and did refuse to appear before one of his majesty's justices of the peace for the said county, to be examined touching the father of the said child. And whereas the said *M. A. M.*, having appeared before me pursuant to my summons, hath shown no cause why she should not be examined touching the father of the said bastard child, but hath refused and doth refuse to be so examined," &c. The warrant then required the keeper of the house of correction to receive *M. A. M.* into his custody, and her safely keep, until she should submit to be examined touching the father of the said child. The warrant having been read,

Campbell moved, that *M. A. Martin* might be discharged out of custody.

Oldnall

Oldnall Russell showed cause. Several objections to this commitment were stated when the writ of habeas corpus was obtained. First, that one justice alone had no jurisdiction; secondly, that the woman could not be compelled to answer enquiries respecting the father of the child; and, thirdly, that the clerk to the guardians of the poor was not the proper person to make the complaint. First, as to the jurisdiction. It must be remembered that there are three steps to be taken in making provision for the maintenance of bastards, securing the reputed father, making an order upon him, and enforcing that order. The proceeding now in question was with a view to the first of those steps, viz. securing the reputed father. The 49 G. 3. c. 68. does not apply to cases where the woman has been delivered before examination, but under the 6 G. 2. c. 31. one magistrate has power to take an examination, for by the first section it is enacted, "that if any single woman shall be delivered of a bastard child chargeable, or likely to become chargeable to any parish, and shall in an examination to be taken in writing upon oath before any one or more justice or justices of the peace, charge any person with having gotten her with child, such justice or justices may issue a warrant to apprehend the party charged," &c. This enactment, giving to one justice the power to take an examination, also gives by implication authority to send for the woman and to compel her to be examined. The fourth section shows that the legislature considered that such a power was given, for by that section it is enacted, "that it shall not be lawful for any justice or justices of the peace to send for any woman whatsoever before she shall be delivered, and one month after, in order to be examined concerning

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Ex parte
MARTIN.

CASES IN MICHAELMAS TERM

1826.

*Ex parte
MARTIN*

her pregnancy, or *to compel* any woman, *before* she shall be delivered, to answer any questions relating to her pregnancy." In *Rex v. Ravenstone* (*a*), an examination taken by one justice under the 6 G. 2. c. 31. was considered sufficient, and admitted in evidence upon a question of settlement, the mother of the bastard being dead. Where the examination is made the foundation of an order, the case is very different, and then it must be taken before two justices, as was held in *Rex v. Beard* (*b*), and *Reg. v. West.* (*c*) In *Billings v. Prinn* (*d*), it was held that the commitment of the woman must be by two justices, but that was a proceeding under the 7 Jac. 1. c. 4. s. 7. by which power to commit is given to *justices* of the peace. If the statute gave to the justice a power to examine, he had incidentally power to compel the woman to answer, *Rex v. Jackson.* (*e*) That case also shows that the commitment of the woman until she should answer was correct. Lastly, the clerk to the guardians of the poor was the proper person to make the complaint, *Rex v. Martyr and Fulham.* (*f*)

Campbell contrà. The case of *Billings v. Prinn* is directly in point. That was a commitment for refusing to filiate a child. It was taken for granted that the order of commitment was made under the 18 Eliz. or 7 Jac. 1., it was never contended that such an order could be made under the 6 G. 2. c. 31., and the commitment being signed by one justice only was held bad. The latter statute only gives the magistrate jurisdiction in the case of a woman coming and charging some person

(*a*) 5 T. R. 373.(*c*) 6 Mod. 180.(*e*) 1 T. R. 655.(*b*) 2 Salk. 478.(*d*) 2 W. Bl. 1017.(*f*) 13 East, 55.

as

as the father of her child; he has no power to compel her to come. Again, it is clear that complaint must be made by the guardians of the poor, and not by their clerk. There is another objection to this order; it does not state that the child was alive or chargeable, or likely to become chargeable, to the parish, at the time when the complaint was made.

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Ex parte
MARTIN.

ABBOTT C. J. I am of opinion that one justice had not power to compel this woman to be examined. A power to that effect is virtually given to two or more justices by the 18 *Eliz. c. 3.*; but the question is, whether it be incidentally given to one by the 6 *G. 2. c. 31.* It was thereby enacted, "that if any single woman shall be delivered of a bastard child which shall be chargeable, or likely to become chargeable to any parish; and shall in an examination to be taken in writing upon oath before any one or more justice or justices of the peace of any county, &c. *charge* (i. e. if the woman shall charge) any person with having gotten her with child, the justice or justices may cause him to be apprehended." It is not necessary to infer from that enactment, that one justice has power to compel the woman to be examined, for that power was already given to two justices; and although one justice may act if the woman comes before him and charges any person with being the father of her child, that is very different from compelling her to answer interrogatories, and so to make such a charge. Nor does the proviso in the fourth section remove the difficulty. That is a negative; and if an affirmative was intended to be implied, then, at all events, the justice should have stated, on the face of the warrant, that a month had elapsed from the delivery of the woman,

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MARTIN.*

before she was sent for in order to be examined. She must, therefore, be discharged.

Mary Ann Martin discharged.

*Monday,
November 20th.*

BIDGOOD against DAVIES and Another.

One of the wardens of the Tower was arrested, and informed at the time that the plaintiff would be satisfied if he would enter an appearance. He, however, claimed his privilege, but afterwards executed a bail bond. The Court refused to order the bail bond to be delivered up to be cancelled.

THE defendant *Davies* was, on the 5th of February 1819, appointed one of his majesty's yeomen or wardens of the Tower of London. He had a salary of 21*l.* per annum, which he had regularly received since his appointment. The duties of the office required frequent attendance at the Tower of London, and particularly upon half-yearly musters of the yeomen. He was obliged also to be in daily and hourly readiness to attend on His Majesty's person to the House of Lords, at the Royal Castle and Palace of Windsor, at Carlton Palace, and wheresoever His Majesty might please to command his presence. He was subject to military discipline, and liable to penalties in case of non-attendance or neglect of his duties. Part of his duty was to keep in custody state prisoners, and in rotation with the other wardens, to keep nightly watch at the Tower. A writ having issued against him, he informed the sheriff's officer who arrested him, that he was a yeoman of the guard; showed him his appointment, and said that he could not be arrested; he was then told that the plaintiff did not wish to have him taken into custody, but would be satisfied if he would enter an appearance; this, however, he refused to do, and he was accordingly arrested. An application was made to the Lord Chief Justice, on the

the 26th of October 1826, for an order to discharge him out of custody. The Lord Chief Justice expressed some doubts as to the propriety of granting such an order, and left the defendant to apply to the Court, and he thereupon put in bail. A rule nisi having been obtained for delivering up the bail bond to be cancelled upon his filing common bail,

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 Bidgood
against
DAVIES.

The *Solicitor-General* now showed cause. This is an application to the discretion of the Court. As it appears that the defendant is not in custody, and he was informed at the time of the arrest, that the plaintiff required him only to enter an appearance, the Court will best exercise that discretion by leaving him to sue out his writ of privilege.

Dowling and *Chitty* contra. This case is distinguishable from that of *Luntley v. Battine.* (a) There the defendant had no salary, but in this case the defendant is a servant in ordinary with fee, and that being so, it is quite clear that he cannot be arrested. He is therefore entitled to his privilege as a matter of right, and to have the bail bond delivered up on filing common bail.

ABBOTT C. J. If the defendant *Davies* in this case were in actual custody, so that His Majesty might be likely to lose the benefit of his services if they were required; or if the defendant was likely to incur the forfeiture of his office by reason of his being prevented from discharging the duties of that office, there might be

(a) 2 B. & A. 254.

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 BIEGOOD
against
DAVIES.

good ground for contending that this Court ought to decide the question of privilege on motion; but it appears that the defendant is not in custody. He was informed at the time when the writ was executed, that he would not be arrested if he would put in common bail. That being so, he is entitled only to his strict right, which is to enforce his privilege in the specific mode pointed out by law, viz. by a writ of supersedeas. Assuming, therefore, that he has the privilege for which he contends, we think that we shall best exercise our discretion by leaving him to enforce it by a writ of supersedeas.

Rule refused.

*Monday,
November 20th.*

FEARNE against WILSON.

A charge in an attorney's bill for attending at a lock-up-house and obtaining defendant's release, and filling up the bail bond, is a charge at law within the statute 2 G. 2. c. 23. s. 23., and renders the bill subject to taxation.

E. LAWES had obtained a rule for referring to the Master, for taxation, the bill of costs of the defendant's attorney in this cause. All the items of the bill except one were agreed to be out of the statute 2 G. 2. c. 23. That one was as follows:

Yourself ats. Fearne, Same ats. Burwash, 13th December 1825. Attending you and your bail at Radford's Lock-up-house in Carey Street, and obtaining your release, on guaranteeing the responsibility of your bail and filling up the bonds. Engaged one hour and a half, 1*l.* 1*s.*

R. Bayly now showed cause. The item in question is not a charge for any thing done at law or in equity within the meaning of the statute. In *Burton v. Chatterton*

ton (a) a charge for preparing an affidavit of a petitioning creditor's debt, and bond to the Chancellor, in order to obtain a commission of bankruptcy, was held not to be a taxable item in an attorney's bill within the 2 G. 2. c. 23. s. 23., as a charge at law or in equity, the affidavit not having been sworn nor a commission issued. It is true that in *Sandom v. Bourn* (b) it was held at Nisi Prius that a bill was taxable which contained a charge for preparing a warrant of attorney with a view to business to be done in court, but *Bayley and Best Js.*, in *Burton v. Chatterton*, expressed doubts as to the propriety of that decision. Besides, here it was no part of the duty of the attorney to fill up the bail bond, and consequently the charge made for so doing is not for any thing done in the course of his business as an attorney.

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FEARNE
against
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E. Lawes contrà. The statute 2 G. 2. c. 23. s. 23. being beneficial to the subject, ought to be construed liberally. In *Winter v. Payne* (c) drawing and engrossing an affidavit of debt, in order to hold a party to bail, and attending to get the deponent sworn thereto, were held to make a bill subject to taxation. So a dedimus potestatem charged in an attorney's bill was held to be a sufficient item to enable the Court to refer a bill for taxation, though with this exception it consisted entirely of charges for conveyancing, *Ex parte Prickett*. (d) So where a bill consisted merely of a charge for drawing a warrant of attorney, and attending a defendant respecting it, the Court referred it to taxation, and said that

(a) 3 B. & A. 486.

(b) 4 Camp. 68.

(c) 6 T. R. 645.

(d) 1 New Rep. 266.

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 FEARNE
 against
 WILSON.

they had a paramount jurisdiction, independently of the statute, to refer an attorney's bill for taxation, *Wilson v. Gutteridge*. (a)

ABBOTT C. J. The question is, whether the item in this bill be a charge at law or in equity within the meaning of the statute 2 G. 2. c. 28. s. 28. It is certainly a charge for something done by the attorney in the progress of a suit, for he fills up the bail bond in the progress of the suit. It is said that filling up a bail-bond is no part of an attorney's duty; but if an attorney choose to fill it up, and make a charge for so doing, that must be considered as a charge made by him for something done by him as an attorney. I am of opinion that this is a charge at law within the meaning of the statute, and consequently this bill is subject to taxation. The rule must therefore be made absolute.

Rule absolute.

(a) 3 B. & C. 157.

Wednesday,
November 22d.

The KING *against* The Inhabitants of
 TONBRIDGE.

A pauper held
 a house at the
 annual rent of
 8*l.*, from *Lady-*
day to Michael-
mas, 1821, and

UPON an appeal against an order of two justices,
 whereby *John Hazell* and *Mary* his wife were re-
 moved from the parish of *Tonbridge*, in the county of
Kent, 1821 to *Michaelmas* 1821 to *Lady-day* 1822, at the annual rent of 9*l.*. and
 during the whole of that period he was the tenant of a garden at an annual rent of two
 guineas; but he had agreed with another person that they should share the expence and the
 profits arising from the cultivation of the garden, and that person paid him half of the rent,
 but he paid the whole to the landlord: it was held that he did not gain a settlement, because
 he did not during the whole year, as required by the 59 G. 3. c. 50., hold a house and
 occupy land which together were of the annual value of 10*l.*

Kent,

Kent, to the parish of *Lamberhurst*, in the same county, the sessions quashed the order, subject to the opinion of this Court upon the following case :

Upon the hearing of the appeal, it was proved, on the part of the parish of *Tonbridge*, that the pauper, *John Hazell*, and *Mary* his wife, had been removed in 1812 from the parish of *Frant* to the parish of *Lamberhurst*, under an order of removal, against which no appeal had been prosecuted. On the part of the appellant parish it was proved, that the pauper, *J. Hazell*, about *Michaelmas* 1816, took a cottage, situate in the parish of *Tonbridge*, of one *Douch*, for a year, at the yearly rent and of the value of 8*l.* 10*s.*; at *Michaelmas* 1817 he made a fresh agreement for the cottage for one year, at the annual rent of 8*l.*, and continued to hold and occupy it from that time until *Michaelmas* 1821, paying a rent of 8*l.* per annum only for it from *Michaelmas* 1817; at *Lady-day* 1821 he took a garden, also situate in the parish of *Tonbridge* for a year, at the yearly rent and of the value of 2*l.* 2*s.*; he agreed with one *William Maynard*, that they should share the expense and the profits arising from the cultivation of the garden. *Maynard* paid to *Hazell* half of the rent, but the latter paid the whole rent to the landlord, who was not (to the knowledge of *Hazell*) aware of the partnership; the garden was thus occupied for a year, until *Lady-day* 1822, and the rent paid for the whole year. At *Michaelmas* 1821, *Hazell* having quitted *Douch*'s house, took a house situate in the parish of *Tonbridge*, of one *Laurence*, for a year, at the yearly rent of 9*l.*, and he occupied it from that time, until his removal in 1825, and paid the rent for it during the whole

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The King
against
The Inhabit-
ants of
TONBRIDGE.

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The King
against
The Inhabit-
ants of
Tottenham.

whole time. The case was argued at the sittings after *Trinity* term by

Bolland and *D. Pollock* in support of the order of sessions. *Rex v. North Collingham* (a) is an authority to show that different holdings will confer a settlement, under the statute 59 G. 3. c. 50., provided the holdings be at the same time. In that case there was an under-letting as well as in the present case. Here the pauper was the tenant of the whole garden ; he therefore rented a tenement consisting of a house or building, and of land, of the annual value of 10*l.* 2*s.* from *Lady-day* 1821 to *Michaelmas* 1821, and of the annual value of 11*l.* 2*s.* from *Michaelmas* 1821 to *Lady-day* 1822.

Marsham contrà. In order to gain a settlement by the renting of a tenement the statute 59 G. 3. c. 50. requires that the tenement shall consist of a house or building held for a year, or of land occupied for a year, or of both; but if it consist of both, the house must then be held for a year, and the land must be occupied for a year. Now during the year, when the land was occupied, the tenant did not hold any one house. That distinguishes this case from *Rex v. North Collingham*, for there the tenant held one house for the year, and occupied the garden during the same period. Besides, if the tenement in respect of which the settlement is claimed consist of a house and land, it is necessary that the house held and the land occupied for a year should be together of the annual value of 10*l.* Now, from *Lady-day* to *Michaelmas* 1821, the pauper held a house

(a) 1 B. & C. 578.

of

of the annual value of 8*l.*, and during the same period he occupied a moiety only of the garden, which was of the annual value of 1*l.* 1*s.* only, the other moiety being occupied and paid for by *Maynard*. During that time the annual value of the tenement was not 10*l.*, but 9*l.* 2*s.* only, and, consequently, no settlement was gained.

Cur. adv. vult.

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The King
against
The Inhabit-
ants of
Tonbridge.

The judgment of the Court was now given by *BAYLEY J.* This was a settlement question between the parishes of *Tonbridge* and *Lamberhurst*, depending on the 59 G. 3. c. 50. The facts were these: the pauper was removed to *Lamberhurst* in 1812, and there was no appeal. In 1816 he took a cottage in *Tonbridge*, at 8*l.* 10*s.* per annum, but in 1817 the rent was reduced to 8*l.* He continued in that cottage till *Michaelmas* 1821. At *Lady-day* preceding (in 1821) he took a garden at 2*l.* 2*s.* a year; but he agreed with one *Maynard*, that the expence and profits should be shared between them. The garden was occupied a year, and the rent paid. At *Michaelmas* 1821, when he quitted the house of 8*l.* a year, he entered upon another at the yearly rent of 9*l.*, which he occupied till 1825. So that from *Lady-day* 1821 to the *Michaelmas* following he had the garden and the 8*l.* house, and from *Michaelmas* 1821 to *Lady-day* 1822, he had the garden and the 9*l.* house; and it is only from *Lady-day* 1821 to *Lady-day* 1822 that there is any pretence for saying he had 10*l.* a year. By 59 G. 3. c. 50. (which operated from 2d of July 1819) no settlement shall be gained by dwelling forty days in any tenement rented, unless such tenement consist of a house or building in the parish or township, being a separate and distinct dwelling-house or building,

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The King
against
The Inhabit-
ants of
TOWNSHEND.

ing, or of land there, or of both bona fide hired at 10*l.* a year for a whole year, nor unless such house or building shall be held, and the land occupied, and the rent for the same actually paid, for one whole year at the least, by the person hiring the same. One of the requisites, therefore, in case of land under that statute, was, that it shall be occupied by the person hiring it for one whole year at the least. A distinction is made in that statute between houses and buildings on the one hand, and land on the other; and though this distinction is removed by the 6 G. 4., as to settlements subsequent to the period from which that statute operates, it must still be attended to in cases of previous settlements. By the 59 G. 3. c. 50. it was required, in case of a house or building, that it should be *held* for a year by the person hiring them; in the case of land, that he should *occupy*. In houses and buildings, therefore, so as the tenure subsisted, it was in this respect, before the statute of 6 G. 4. c. 57., sufficient, so that underletting a part of a house or building would not have prevented a settlement, and that point was accordingly so decided in *Rex v. North Collingham* (*a*), which was cited in the argument. But in the case of lands the person hiring was to *occupy* for the year. Did the pauper then occupy the garden for the whole year? It is stated in the case, that though the pauper took the garden, it was agreed between him and *Maynard*, that they should share the expence and profit. It is also stated, that *Maynard* paid the pauper half the rent, and that the garden was thus occupied. It is not in terms stated that there was a joint occupation, but as

(a) 1 B. & C. 578.

Maynard

Maynard was entitled to participate in the occupation, we think it must be taken that he did, and if so, the pauper cannot be considered as occupying more than a moiety of the garden. Unless the garden was separately occupied by the pauper the whole year, no settlement was obtained. We are, therefore, of opinion, that there was no settlement in *Tonbridge*, that the settlement in *Lamberhurst* remained; and that the order of sessions, which quashed the removal to *Lamberhurst*, on the ground of a settlement in *Tonbridge*, cannot be supported.

1826.

The KING
against
The Inhabit-
ants of
Tonbridge,

Order of sessions quashed.

The KING against The Inhabitants of
CARSHALTON.

Wednesday,
November 22d.

UPON an appeal against an order of two justices, whereby *Charlotte Long*, widow, and her two children, were removed from the parish of *Carshalton*, in the county of *Surrey*, to the parish of *Wandsworth*, in the same county, the sessions quashed the order, subject to the opinion of this Court on the following case :

T. Long, the husband of the pauper, who was previously settled by apprenticeship in the parish of *Wandsworth*, at *Lady-day* 1824 came with his family to reside in a house in the parish of *Carshalton*, which he had hired of his father-in-law *D. Tarling* by the year, at

The statute
59 G. 3. c. 50.
makes the pay-
ment of a year's
rent by the per-
son hiring a
tenement a
condition pre-
cedent to the
gaining of a
settlement by
reason of dwell-
ing therein for
forty days.

The statute
6 G. 4. c. 57.
repeals that
statute, but still
makes the pay-
ment of the
year's rent, but
not by the party
having the

same, a condition precedent to the gaining of a settlement, and, therefore, where a person, after the passing of the 59 G. 3. c. 50., hired a tenement of the annual value of 10*l.*, and held it for more than a year, but died before a whole year's rent was paid, he was held to gain no settlement, although after his death, and after the passing of the 6 G. 4. c. 57., the rent was paid out of money produced by the sale of his goods.

the

1826.

The KING
against
The Inhabit-
ants of
CASHALTON.

the rent of 14*l.* He put his own furniture into the house, and continued to reside there until *July 1825*, when he died in possession. During his life-time no more than the sum of 25*s.* was paid by him on account of the rent. His widow after his death continued to reside in the house in question, until the month of *September* following, when *D. Tarling*, the landlord, put a distress into the premises, under which he seized the furniture and goods which had been put in by *T. Long*, and the same were afterwards sold and purchased by the said *D. Tarling* for the sum of 12*l. 15s.*, upon which the following receipt was given. "Received from Mr. *Savage*, of *Tooting*, on advance of goods, the sum of 12*l. 15s.* for balance of rent due from Mr. *T. Long* to *Midsummer 1825. D. Tarling.*"

Barnewall in support of the order of sessions. The pauper had a derivative settlement from her husband. The statute 6 G. 4. c. 57., which was passed on the 22d of June 1825, recites the statute 59 G. 3. c. 50., and then repeals the same, without providing for cases which occurred between the passing of the two statutes. The statute 59 G. 3. c. 50., pro tanto, repealed the statute 13 & 14 Car. 2., which made the residing for forty days upon a tenement of 10*l.* yearly value a good settlement. Now in *Com. Dig. tit. Parliament, R. 9.* it is laid down, that "an act which repeals a statute by which another was repealed, will be a reviver of the statute which was repealed." And Lord *Coke* says (*a*), the old law becomes thereby revived, as if the mere repealing statute had never been passed. That being so, then during

(a) 12 Co. 8.

the interval between the passing of the statute 59 G. 3. c. 50. and the statute 6 G. 4. c. 57. the husband of the pauper gained a settlement by residing forty days upon the tenement in question. But assuming that to be otherwise, there was a sufficient payment of rent to satisfy the statute 59 G. 3. c. 50. by the person hiring the house, for the rent was paid out of the produce of the goods of the husband. Besides, the year's rent did not become due till *September* 1825, and the statute 6 G. 4. c. 57., which received the royal assent in *June* 1825, requires only that the rent should be paid for the term of one whole year at the least, and not that it shall be paid by the party holding the house. Here the rent was paid for one whole year, and the provisions of the statute which was in force at the time when it became due, were, therefore, complied with.

Thesiger contrà. The settlement of the pauper must be derived from her husband, but he at the time of his death had not acquired any settlement, because he had not paid a year's rent, and the statute 59 G. 3. c. 50. makes that a condition precedent to the gaining of a settlement by renting a tenement. If the argument on the other side were to prevail, it would have the effect of conferring a settlement on a man after his death. *Rex v. Ampthill* (a) is a stronger case than the present, for there the rent was actually paid by the pauper himself, but the payment having been made after his removal to another parish, was held to be too late. Then the effect of the repeal of the statute 59 G. 3. c. 50. is only to let in the old law from the time of the repeal. If the argument urged on this

1826.

The KING
against
The Inhabit-
ants of
CARRHALTON.

(a) 2 B. & C. 847.

point

1826.

The KING
against
The Inhabit-
ants of
CARMARSHALLTON.

point on the other side were to prevail, every thing done and every right acquired under the 59 G. 3. c. 50. would be void. [Bayley J. If that doctrine were to prevail, the consequences may be thus illustrated: Suppose it to have been felony without benefit of clergy, at common law, to steal to the amount of forty shillings in a dwelling-house, and that a statute gave benefit of clergy for such an offence, and that that statute were afterwards repealed by another, then, according to the argument, an offence committed between the passing of these two acts, but not brought to trial till after the repealing statute passed, would be an offence not clergyable.] Besides, if the argument as to that point were well founded, it would be immaterial; for the statute 6 G. 4. c. 57. was passed on the 22d of June, some months before the rent was paid. That therefore would prevent the perfection of a settlement which at the time when it passed was inchoate, *Rex v. St. Mary-le-bone.* (a)

ABBOTT C. J. The question in this case is, whether the pauper had any settlement derived from her husband. I am of opinion that whether we consider this case to be governed by the 59 G. 3. c. 50. or the 6 G. 4. c. 57. the husband himself had not gained any settlement by the renting of this tenement; for there was not any payment of rent by the person hiring the tenement as required by the statute 59 G. 3. c. 50., nor any payment of one whole year's rent as required by the statute 6 G. 4. c. 57. The husband, not having acquired a settlement in his life-time, the pauper cannot have from him a derivative settlement. The order of sessions must therefore be quashed.

Order of sessions quashed.

(a) 4 B. & A. 681.

1826.

The KING against The Inhabitants of SAINT
MARGARET's, KING'S LYNN.

Wednesday,
November 23d.
A.D. 1826.

TWO justices for the county of Norfolk, by order, removed *J. Catton, Sarah his wife, and their five children*, from the parish of St. Margaret's, in King's Lynn, to the parish of Welferton. The sessions, on appeal, quashed the order, subject to the opinion of this Court on the following case:

It was proved that one *Headley*, a shoemaker, a friend of the pauper's mother's family, applied to her, and offered, if she would agree to his proposal, that he would take her son, then a boy, to learn his business; but there were no indentures on account of her poverty; the pauper was to serve for four years; to board and lodge with his mother in St. Margaret's in Lynn, and to have half what he earned. The pauper entered upon this service; worked in the shop with the apprentices; did not stay with his master on a *Sunday*; and was not required to do any work but in the shop. The pauper continued in the service four years, boarding and lodging in St. Margaret's Lynn. Some time after entering upon the service, *Headley* sent the following writing by the pauper to his mother, which was neither stamped nor signed: "An agreement drawn up between Mrs. *Catton* and *Thomas Headley*, that the said *Thomas Headley* is to find her son *John Catton* work for four years, and he is to have half what he earns all the four years; and Mrs. *Catton* to find her son *John Catton* every thing else during the four years." The court of

A master shoemaker made a proposal to a poor woman to take her son to learn his business; the son was to serve him for four years, to board and lodge with his mother, and to have half what he earned. No indentures were executed on account of the poverty of the mother: Held, that this was a defective contract of apprenticeship, and not a contract of hiring, and consequently that the pauper did not gain any settlement by serving under it.

1826.

The King
against
The Inhabit-
ants of
St. Mary's
Lynn.
King's

quarter sessions considering the pauper gained a settlement by hiring and service, quashed the order of removal.

Alderson in support of the order of sessions. The contract under which the pauper served was one intended by the parties to create the relation of master and servant, and not that of master and apprentice. The agreement was, that the master was to find work for the pauper for four years. That of itself was a contract of hiring and service. It is true that the master also agreed to teach the pauper his trade, but the instruction may have been intended as an equivalent in part for his services. It does not show that a contract of hiring and service was not intended, *Rex v. Little Bolton*. (a) Besides, there was no premium paid in this case; and that of itself is a strong circumstance to show that an apprenticeship was not intended. In *Rex v. Bilborough* (b), and *Rex v. St. Mary, Kidwelly* (c), where a premium was paid, and the circumstances were otherwise similar to those in the present case, the contract was held to be one of apprenticeship; but in *Rex v. Burbach* (d), where no premium was paid, the contract was held to be one of hiring and service.

Marryat and *Massing* contra. This is a defective contract of apprenticeship, and not a contract of hiring. In *Rex v. Little Bolton* (e), nothing was said respecting apprenticeship; and in *Rex v. Eccleston* (f) Lord *Ellen-*

(a) *Cold. 367. 2 Batt. 221. pl. 264.*(b) *1 B. & A. 115.*(c) *2 B. & C. 750.*(d) *1 M. & S. 370.*(e) *Cold. 367. 2 Batt. 221. pl. 264.*(f) *2 East, 298.**borough*

brough expressed himself dissatisfied with the reasoning in that case. The true criterion is, whether the contract be that one shall teach and the other learn the trade, *Rex v. Mountsorrell* (a) and *Rex v. Rainham*. (b) Here the intention of the parties is manifest; for the master not only agrees to teach the pauper his trade, but the contract of apprenticeship would have been completed had it not been for the poverty of the mother.

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against
The Inhabit-
ants of
St. Mary's,
King's
Lyne.

BAYLEY J. I am of opinion that the contract between the parties in this case was an imperfect contract of apprenticeship, and not a contract of hiring. Every case of this description must depend upon its own particular circumstances. If from all that passed between the parties at the time when the contract was made, they appear to have contemplated the relation of master and apprentice, then the contract must be considered to be one of apprenticeship; and if it be an imperfect apprenticeship, no settlement can be gained by serving under it. If, on the other hand, it appears that the parties contemplated the relation of master and servant, then it must be deemed a contract of hiring, and a settlement will be gained by serving under it. The payment of a premium is strong evidence to show that the parties contemplated an apprenticeship, but it is not decisive, and still less is the absence of a premium evidence to show that the parties contemplated a contract of hiring. In this case the written agreement must be laid out of consideration, because it was not signed, and had not the

(a) 2 M. & S. 460.

(b) 1 East, 531.

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The King
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ants of
St. Marga-
ri't's, King's
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other requisites to make it binding on the parties. We must look to the original bargain between the master and the mother of the pauper, in order to ascertain the intention of the parties. The object held out by the master to the mother was, that he would teach the pauper his trade. His purpose, therefore, was to teach the pauper his trade; the pauper was to serve four years, to board and lodge with his mother, and to have half what he earned. In ordinary cases indentures of apprenticeship are executed, but in this case they were not executed on account of the poverty of the mother. Now, if the parties had contemplated the relation of master and servant only, the execution of indentures would never have been thought of. The fact stated in this case, that indentures were not executed only on account of the poverty of the mother, shows beyond all doubt that it was the intention of the parties to contract the relation of master and apprentice, and not that of master and servant. *Rex v. Little Bolton* (*a*) comes very near the present case, there the proposal was made by the pauper to a weaver, that he should teach the pauper to work counterpanes; but although the object of the pauper was to be taught, the master only agreed to teach him upon condition, that the pauper would work for a given time. Now, in many instances, the object of the party who hires himself is to learn a particular trade, and the instruction he receives is a partial remuneration for his services. In *Rex v. Burbach* (*b*) the stipulation was, that the pauper should work for two years and have what he got, allowing his master (inter

(a) *Cald.* 367. 2 *Batt.* 221. pl. 264.(b) 1 *M. & S.* 370.

alii)

alio) 2s. a week for teaching him the business: that was held to be a contract of hiring and service, but there was nothing in that case to show that the relation of master and apprentice was ever contemplated by the parties. Here it is manifest, that a contract of apprenticeship was contemplated, and was not completed only in consequence of the poverty of the mother of the pauper. That being so, I think that this was an imperfect apprenticeship, and that the order of sessions must be quashed.

HOLROYD J. I am of opinion that the relation of master and apprentice was contemplated by the parties in this case, or at least that there is not sufficient ground to warrant us in concluding that the relation of master and servant was contemplated by the parties. It appears that application was made by the master, who was a shoemaker, to the mother of the pauper, and he offered, if *she would agree to his proposal*, that he would take her son, then a boy, to learn his business. That was the subject of the application, and it was for the mother to consider, whether she would consent to the proposal made to her. The terms upon which the master undertook to teach the pauper his business was, that the pauper should serve for four years. Now, for what purpose was he to serve for four years? to learn the business. I think that there was not sufficient in this case to warrant the sessions in finding that the relation of master and servant subsisted between these parties. The fact of the pauper's having served the master did not warrant them in concluding that he served in the character of servant and not of apprentice, for

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ants of
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then's, King's
Lynn.

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ants of
Mr. Marci-
an's, King's
Lynn.

mere service does not constitute the relation of master
and servant.

LITTLEDALE J. concurred.

Order of sessions quashed.

Thursday,
November 23d.

The KING against CALLANAN.

In an indictment for making a false affidavit, it is sufficient to state that the defendant came before A. B. and took his corporal oath (A. B. having power to administer an oath) without setting out the nature of A. B.'s authority.

When perjury is assigned upon several parts of an affidavit, those parts may be set out in the indictment as if continuous, although they are in fact separated by the introduction of other matter.

THE defendant was indicted for perjury in an affidavit made in order to obtain a rule for certain purposes in the Court of King's Bench. The indictment alleged that the defendant on, &c. at, &c. came before F. J. Chell, gentleman, and then and there was duly sworn and did take his corporal oath, &c. before the said F. J. Chell, (he the said F. J. Chell then and there having sufficient and competent power and authority to administer the said oath to the defendant in that behalf,) and the said defendant being so sworn as aforesaid, falsely, maliciously, wilfully, and corruptly did then and there before the said F. J. Chell, as such commissioner as aforesaid, depose, swear, and make affidavit in writing, amongst other things, in substance and to the effect following; that is to say, &c. The indictment then set out various matters deposed to, as if they had been continuous in the affidavit. Plea, not guilty. At the trial before Abbott C. J. at the London sittings after last Easter term, it appeared that F. J. Chell, before whom the affidavit was sworn, was a commissioner duly appointed for taking affidavits in the Court of King's Bench, but on the production of the affidavit it appeared that the parts set out in the indictment were not continuous,

tinuous, but were separated by the introduction of other matter. It was therenpon objected, that there was a variance between the indictment and the proof; but the Lord Chief Justice overruled the objection, and the defendant was found guilty. He was now brought up for judgment, when

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against
CALLAGHAN.

Scarlett moved for a rule for a new trial, or to arrest the judgment. There was clearly a variance between the affidavit set out in the indictment and that given in evidence. The latter contained various passages which were not set out on the record, and the statement on the record gave no intimation that any parts were omitted. The proper mode of stating it was: "In one part whereof the defendant swore such and such things, and in another part whereof he swore certain other things," &c. In actions or indictments for libel such a variance would clearly be fatal, *Tabart v. Tipper*. (a) [Abbott C. J. In actions or indictments for libel the titor must be set out; in indictments for perjury it is sufficient to state the substance and effect of the false oath: the variance pointed out is therefore immaterial. (b)] Then the indictment itself is bad, inasmuch as it does not describe the official station of the person before whom the defendant was sworn. It is indeed stated that he made affidavit of certain matters before F. J. Chall, as such commissioner as aforesaid; but he had not been before mentioned as a commissioner, and therefore that averment cannot cure the defect. The 28 G. 2. c. 11. makes it unnecessary to set out the commission of the person before whom the oath is taken, but that does

(a) 1 Camp. 350.

(b) See *Rex v. Solomon*, 1 R. & M. 252.

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against
CALLANAY.

not dispense with the necessity of showing the nature of his office.

ABBOTT C. J. Looking at the act of parliament 23 G. 2. c. 11. we find that all that is required to be set out in indictments for perjury is the substance of the offence charged, and by what court or before whom the oath was taken, averring such court or person to have competent authority to administer the same, without setting forth the commission or authority of the court or person before whom the perjury was committed. It is therefore to be considered whether the present indictment has set forth all that is required by the statute. It sets forth the substance of the matter sworn; the person before whom the oath was taken, and avers that he had authority to administer it. The indictment does therefore contain all that is required by the words of the statute; and taking into consideration the object of the act, which was framed to remove the difficulties before felt by reason of the severments and matters which were usually set out in indictments for perjury, we ought not to require more than the words of the legislature have made necessary. When a case of this sort comes on for trial, the prosecutor must prove the situation of the person before whom the oath was taken, and the nature of his authority. I am therefore of opinion, that the indictment is sufficient if it contains the name of the person, if the defendant was sworn before a person, or of the court, if he was sworn before a court. There is not then any reason for granting this application.

Rule refused.

1826.

TODD and Others *against* MAXFIELD.*Friday,
November 24th.*

DEBT on a judgment obtained in K. B. in *Hilary* term, 4 G. 4. in an action of assumpsit. Plea, bankruptcy and certificate of the defendant, and that the causes of action upon which the judgment was obtained accrued to the plaintiff before the defendant became bankrupt, and this defendant is ready to verify, wherefore he prays judgment, if the plaintiffs ought to have execution for their debt and damages aforesaid, on or against the person of the defendant. Replication, stating the proceedings in the original action, the issuing of the writ, appearance, declaration, issue, and trial. And the plaintiffs further say, that the certificate in the plea mentioned was allowed by the Lord Chancellor before the trial of the said issue so joined between the plaintiffs and defendant as aforesaid; and that the defendant did not at any time before the giving of the said judgment in that behalf as aforesaid, plead the said certificate to the said action. Demurrer and joinder. When the case came on to be argued, the Court intimated a strong opinion in favour of the plaintiffs; whereupon *Conyn*, for the defendant, prayed leave to withdraw his demurrer, which was granted on payment of costs. The costs were taxed; but the defendant not having paid them, *F. Pollock* now prayed judgment for the plaintiffs, which the Court accordingly pronounced.

Judgment for the plaintiffs.

Where a person who has become bankrupt is tried for a cause of action occurring before his bankruptcy, and pending the suit and before trial obtains his certificate, he must plead it *puis darrein continuance*; and if he neglects to do so, and judgment is obtained against him, he cannot plead his certificate to an action on such judgment.

1826.

*Saturday,
November 25th.*

NORTON, Gent., One, &c., *against MOSELEY.*

Where a party is arrested for a debt from which he has been discharged under the insolvent act, and gives bail, the Court will order the bail bond to be delivered up to be cancelled.

F. POLLOCK had obtained a rule calling upon the plaintiff to show cause why the bail-bond given in this case should not be given up to be cancelled, on the ground that the defendant had obtained his discharge under the insolvent act, 1 G. 4. c. 119., from the debt for which he was arrested.

D. F. Jones and *Abraham* showed cause, and contended, that although the 1 G. 4. c. 119. s. 26. authorized the Court to discharge a person out of custody who had been arrested under such circumstances, yet it did not give them power to interfere, and cause the bail-bond to be given up to be cancelled; and they cited a case of *Dove v. Smith* (a).

BAYLEY J. I am not convinced by the case cited. If a party is improperly arrested, I think it is equally the duty of the Court to interfere, whether he remains in actual custody or in virtual custody only, having given a bail-bond; for if a bail-bond is given, special bail to the action must be put in; and then the bail may at any time apprehend the principal, and render him. When so apprehended, he might clearly call for the interposition of the Court; and I cannot discover any reason for saying that we ought not to interfere in the first instance, instead of waiting until all that inconvenience has been suffered.

Rule absolute.

(a) 3 D. & R. 600.

1826.

**FOSTER and Others, Assignees of FOWLER, a
Bankrupt, against FRAMPTON and Another.**

TROVER for 20 hogsheads of sugar. Plea, not guilty. At the trial before Abbott C. J., at the London sittings in this term, the following appeared to be the facts of the case. The plaintiffs were the assignees of one *Fowler*, a bankrupt, who carried on business at *Birmingham* as a grocer. The defendants, who were wholesale grocers in *London*, had, by the order of the bankrupt, on the 22d of *August*, sent him by one *Corbett*, a *Birmingham* carrier, a quantity of lump sugar, and three hogsheads of raw sugar. They arrived at *Birmingham* on the 5th of *September*, and *Corbett* gave the bankrupt notice of their arrival on the 6th, and he removed the lump sugar to his premises, and took samples from the three hogsheads of raw sugar, but desired that they might remain in *Corbett's* warehouse until he received further directions. The bankrupt, for his own convenience, frequently left bulky articles in *Corbett's* warehouse for a considerable time after their arrival. The three hogsheads of sugar remained in the warehouse on and after the 4th of *October*, when the bankrupt quitted *Birmingham*, and committed an act of bankruptcy. On the 12th of *October* the defendants gave notice to *Corbett* not to deliver the three hogsheads of sugar to *Fowler*, or to any person on his account; and *Corbett* ultimately delivered them to the defendants, upon their executing a bond of indemnity. The Lord Chief Justice was of

Where goods are to be delivered to the vendee at a particular place, the transitus in general continues until they are delivered to him at that place; but if he by his own act prevent the delivery, which otherwise in the ordinary course would take place, and does any act equivalent to taking possession, the transitus is thereby terminated; and, therefore, where the vendee of several hogsheads of sugar upon receiving from the carrier notice of their arrival, took samples from them, and for his own convenience desired the carrier to let them remain in his warehouse until he should receive further directions, and before they were removed, became bankrupt, it was held, that the transitus was at an end, and that the vendor was not entitled to stop them.

opinion

1826.

*Foster
against
Frampton.*

opinion that the transitus was at an end, and that the plaintiffs were entitled to recover.

Gurney now moved for a new trial. The defendants were entitled to stop those goods, so long as they were in a mere course of transit to the bankrupt; and they were in a course of transit so long as they continued in the possession of the carrier.

BAYLEY J. It seems to me, that in this case the transitus was at an end. Where a man orders goods to be delivered at a particular place, the transitus continues until they are delivered to the consignee at that place; but that must be understood of a delivery in the ordinary course of business; for if the consignee, before the goods reach their ultimate destination, postpones the delivery, or does any act which is equivalent to taking actual possession of them, the transitus is at an end. Now here, the bankrupt has done such an act, for he not only postponed the delivery which would have taken place in the ordinary course of business, but he took samples, and directed the carrier to keep the goods in his warehouse until he received further directions. From that time the carrier became the warehouseman of the bankrupt, and the goods were as much in the possession of the latter as if he had taken them into his own warehouse. In *Richardson v. Goss* (*a*), *Richardson* of *Newcastle* shipped goods for *London* to the order of one *Wilson*. *Richardson* finding that *Wilson* was in insolvent circumstances, applied at the defendant's wharf in *London*, where the goods had in the meantime arrived, and where goods shipped for *Wilson* were usually landed and kept till sent

(*a*) *3 Bos. & Pul.* 119.

for

for by him, tendering the freight, and charges paid for the goods, and requiring delivery of them, which was refused, unless upon payment of a general balance due from *Wilson* to the defendant for wharfage. *Chambre J.* intimated a strong opinion, that if a man be in the habit of using the warehouse of a wharfinger as his own, and make that the repository of his goods, and dispose of them there, the journey will be at an end when the goods arrive at such warehouse; and Lord *Bosley* expressed his concurrence in that opinion in the case of *Scott v. Pettit.* (a) There a trader had no warehouse of his own, but used that of his packer, for receiving goods consigned to him, and it was held that the transitus of such goods was at an end upon delivery of them to the packer. Now here the bankrupt, on the particular occasion, used the warehouse of the carrier as his own, and made it the repository of his goods. I therefore think that the transitus was at an end as soon as the bankrupt took the samples from the hogsheads, and desired that they should remain in the warehouse till further directions.

HOLROYD J. I think that the possession of the sugar was completely vested in the consignee. The transit of the goods was at an end, by the act of the consignee's treating the goods as his own property, taking part to his own premises, and directing the other part to remain in the warehouse of the carrier. From that moment the latter ceased to be a carrier, and became a mere bailee.

LITTLEDALE J. The taking of the samples was a complete act of ownership. Besides, it appears that

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against
Frampton.

(a) *3 Bos. & Pwl.* 469.

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against
FRAMPTON.

the bankrupt, for his own convenience, was in the habit of leaving goods in the warehouse of the carrier, and that on this occasion he directed them to continue there after the period when they would otherwise have been delivered in the ordinary course of business. From the time when he drew the samples, and gave those directions, the sugar must be considered to have been in the possession of the bankrupt, as much as if he had taken it to his own premises.

Rule refused.

*Monday,
November 27th.*

The KING against The Justices of SUFFOLK.

Notice of holding a special session for the purpose of stopping up a public footway, signed by the chief constables, and served by a person acting under their authority on the justices of the district, is a notice given by the high constable or other proper officer within the meaning of the statute 15 G. 3. c. 78. s. 62.

A N order was made by two justices on the 18th of September for stopping up, as unnecessary, a certain bridleway and footway within the parish of *Newton*, and within the extra parochial place in the hundred of *Thingoe*, in the county of *Suffolk*, commonly called *Hencote Lane*. The notices of holding the special sessions were signed by *John Stutter* and *Thomas Rodwell*, chief constables of the hundred of *Thingoe*, on the 6th of September, but they were served upon the justices by *John Wayman*, one of the clerks to the magistrates acting for the hundred of *Thingoe*. There was no appeal against the order, but the court of quarter sessions were of opinion that the special sessions had not been duly convened, because the notices of holding the special sessions were not *served* upon the justices by the chief constables or one of them. A rule nisi having been obtained for a mandamus commanding the justices to confirm the order,

Biggs

Biggs Andrews now showed cause. The 13 G. 3. c. 78. s. 62. requires that the notices of holding the special sessions for the purpose of stopping up a highway must be given to the justices by the high constable or other proper officer. Now here the notices were signed by the chief constables, but they were given to or served upon the magistrates by one of their clerks. Now *Rex v. The Justices of Surrey* (a) is an authority to show that that is not sufficient.

1826.

The KING
against
The Justices of
SURREY.

Alderson contra. The statute only requires that the notice shall be given by the high constable or other proper officer. Here they were signed by the chief constables, and the party who by their authority served them was their agent for that purpose. The notices therefore were given by the chief constables within the meaning of the act of parliament.

HOLROYD J. I think that the notices in this case having been signed by the chief constables, and by their authority served upon the justices, were given by the chief constables within the meaning of the statute. The rule must therefore be made absolute.

LITTLEDALE J. concurred.

Rule absolute for a mandamus commanding the justices to enter, as of the last general quarter sessions, the application made to them for enrolling the order (describing it), and to enter continuances thereon to the next general quarter sessions to be holden for the county, and at such sessions to hear and determine the application.

(a) 5 B. & C. 241.

1826.

*Tuesday,
November 28th.*

Doe on the demise of JANE SMYTH against
Sir GEORGE HENRY SMYTH, Bart.

Where the devisee of an estate refused to take it, saying she was entitled as heir at law, and would not accept any benefit by the will of the devisor: Held, that this was not such a disclaimer as prevented her from afterwards bringing ejectment and relying on her title as devisee.

*Quare,
Whether a devise of an estate can be waived by parole?*

EJECTMENT to recover the possession of the freehold part of a messuage, farm lands, and premises in the parishes of *Elmswell* and *Norton*, in the county of *Suffolk*. The declaration contained two demises, one on the 2d *March 1814*, the other on the 2d *February 1824*. Plea, the general issue. At the trial before *Gavelin J^r* at the *Suffolk Summer assizes 1824*, by the direction of the learned Judge a verdict was found for the plaintiff, with liberty for the defendant to move to set aside the verdict and enter one for himself. The Court of King's Bench, upon that motion being made, directed the following case to be stated for their opinion: *Anne Brand* being seised in fee of the estate in question, on the 7th *October 1813*, duly executed her last will, which contained a devise in the following words: "I give and bequeath to Miss *Jane Smyth*, of *Ogle Street, London*, all that messuage, farm lands, and hereditaments situate at *Elmswell*, or in any other parish in the county of *Suffolk*, during the term of her life, keeping the said estate in good repair. I also give to the said Miss *Jane Smyth* the sum of 500*l.* for the purpose of discharging the fines and other fees on her admission to the copyhold part of the said estate. I also give to the said Miss *Jane Smyth* all my books, and Sir *Henry Smyth*'s miniature picture. And from and after her decease, I give and devise the said messuage, farm lands, and hereditaments situate in *Elmswell*, or in any other parish

in

in the county of *Suffolk*, unto Sir *Henry Smyth*, of *Beerchurch*, in *Essex*, and his heirs." The testatrix died in *March 1814*, without revoking her said will, and the lessor of the plaintiff and the defendant are the devisees therein named, the latter by the name of Sir *Henry Smyth*. Shortly after the death of the testatrix the Rev. *Charles Cook*, who was one of her executors, called upon the lessor of the plaintiff for the purpose of paying her the said legacy of *500l.*, when she refused to receive the same, and she had not received it at the time of the trial. Early in the year *1815*, and three or four times afterwards in the course of that year, and once in the next, Mr. *John Graham Sarjeant*, the then attorney of the defendant, by his desire called upon the lessor of the plaintiff on the subject of the devise; she claimed the estate as heir at law to Sir *Harvey Smyth*, and on all these occasions she declared she would never accept any benefit under Mrs. *Brand's* will; and on one of them she said she knew there was a legacy to enable her to take up the copyhold, but nothing should induce her to accept that legacy. On one occasion Mr. *Sarjeant* shewed her a pedigree to convince her that she was not the heir at law, but that the defendant was; she said the pedigree was wrong, but did not point out where; and upon Mr. *Sarjeant* telling her that the copyhold might be seized by the lady of the manor, that the defendant would not suffer the estate to go to ruin for want of a landlord, and that if she persisted in refusing to take it up, she must not blame him for any proceeding he might institute, she replied, that he might do as he pleased, but she was determined not to have any benefit under Mrs. *Brand's* will. On Mr. *Sarjeant's* last visit he proposed to her, on the part of Sir *George Henry Smyth*,

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SMYTH
against
SMYTH.

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SMYTH
against
Smyth.

Smyth, that if she did not choose to take the estate, and would permit him to do it, he would account to her for all the profits, and give her security; she answered, she would take nothing under the will; that she had already been kept out of all that estate, and all that Mrs. *Brand* had given to Mrs. *Vincent* since the death of Sir *Harvey Smyth*; that she should claim the whole of the property under that title, and should have nothing to do with the will of Mrs. *Brand*, and that she considered it an insult. Part of the estate in question is freehold and part copyhold. The larger and most valuable part is copyhold. On the 9th *May* 1814, at a general court baron holden for the manor of *Elmswell*, a presentment was made of the death of the testatrix, and a proclamation for any person claiming the copyhold part of the said estate to come in. A second similar proclamation was made on the 8th *November* 1814, and a third on the 6th *March* 1815. No person having appeared on any of those occasions, on the 12th *December* 1815, the copyhold lands were seized by the bailiff of the manor, and an ejectment was brought against the tenants in possession by the lady of the manor. There was no defence to the ejectment, and the lady of the manor took possession of the copyhold land, and retained it from that time to the trial, and received the rents. All the tenants in possession were served with declarations in ejectment. In *Trinity* term 1823 the defendant caused declarations in ejectment to be served on the tenants of the freehold estate, containing two demises by him, the first on the 2d *March* 1814, the second on 17th *March* 1817. Judgment passed by default, and the defendant obtained possession by a writ of habere facias possessionem on the 12th *January* 1824. The jury found a refusal on the part

part of the lessor of the plaintiff to take under the will, and an assertion of title by her from the death of Sir *Harvey Smyth*, but that she had taken no steps to obtain possession under that title.

1826.

Deo dom.
Smyth
against
Smyth.

Starks for the plaintiff. There are two questions in this case, one whether there was in fact a waiver of the devise to the lessor of the plaintiff; the other whether a parol waiver could deprive her of the right to sue. The facts do not by any means prove a waiver. It appears that the lessor of the plaintiff thought she was entitled to the estate as heir at law, she, therefore, did not intend to abandon the estate, but claimed a larger interest than the will gave her. But assuming that a distinct parol waiver had been proved, that would not have sufficed to take the estate out of the devisee. The case of *Townson v. Tickell* (a), is the only one that can be cited for the defendant; but although some doubts as to the necessity of a disclaimer by deed were thrown out by one of the learned judges, the decision of the Court merely amounted to this, that a disclaimer by deed sufficed. In *Thompson v. Leach* (b), it was laid down by *Ventriss J.*, that where tenant for life surrendered by deed to him in remainder, the estate was in the latter without proof of assent, and that by devise the estate is in the devisee immediately. *Co. Litt.* 111 a. and *Butler v. Baker's case* (c) also prove, that by a devise the estate vests in the devisee before assent, and the latter case shows, that when the freehold was once vested in *Miss Smyth*, it could not be divested by parol.

(a) 5 B. & A. 51.

(b) 2 Ventr. 198.

(c) 3 Co. 26.

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Dor dem.
Smyth
against
Smyth.

Dover contra. The fact of refusal is clear. Miss *Smyth* constantly refused to have any thing to do with the estates devised, she never received the rents, and suffered the present defendant to bring ejectments and recover possession. Then as to the disclaimer, *Townson v. Tickell* is the only modern case in which the question has arisen: it was there fully discussed, and the authorities were much considered, and it was held that a disclaimer by deed was clearly sufficient. *Holroyd* J. went further, and expressed an opinion, that unless some strong authority were shown, the Court could not hold that a party was bound to disclaim by deed, and he relied on the case of *Bonefaut v. Greenfield*. (a) In *Shep. Touch. 452. tit. Testament*, it is said, "If one devise his land to another in fee simple, fee tail, for life or years, and the devisee, after the death of the testator, doth refuse and wave the estate devised to him, in this case and by this means the devise is become void. And it seems a verbal waver is sufficient in this case."

Cur. adv. vult.

ABBOTT C. J. In this case we are of opinion that the lessor of the plaintiff is entitled to recover. It is clear that a devised interest vests in the devisee by presumption of law, before entry, *Co. Litt. 111 a.* It may be admitted that a devisee cannot be compelled to accept the devised interest, but may by *some* mode renounce and disclaim it, and that upon such renunciation or disclaimer, it will descend to the heir or pass to a remainder man. And it is not necessary in the pre-

(a) 1 *Leon. 60. Cro. Eliz. 80.*

sent

sent case to decide whether such renunciation and disclaimer may be by parol, because in whatever form they are made, we think they must be a clear and unequivocal disclaimer of any estate in the land. In this case the disclaimer is not of any estate in the land, but only of benefit under the will, accompanied in every instance with an assertion of a right to the land by a higher and better title. This proceeded on a mistake, of which the lessor of the plaintiff, though slowly and reluctantly, was at last convinced. No case similar to this was cited, or has been found. And we, therefore, think the lessor of the plaintiff is not precluded from acting under her improved judgment, and taking the land as devisee under the will. The verdict, therefore, must stand.

1826.

Dox dem.
Smyth
against
Smyth.

Postea to the plaintiff.

Goom against AFLALO.

Tuesday,
November 28th.

ASSUMPSIT brought by the plaintiff against the defendant, for refusing to deliver a quantity of *Babary* gum, pursuant to a contract of sale alleged to have been entered into with the plaintiff by a Mr. *Virgo*, as the broker of the plaintiff and defendant. Plea, the general issue. At the trial before Abbott C. J. at the *London* sittings after last *Hilary* term, a verdict was found for the plaintiff. Afterwards, upon a motion for a new trial, the Court directed that the facts should be stated for their opinion in the following case:

Mr. *Virgo*, as the broker of the defendant, and with his authority, agreed with the plaintiff, that the defendant should sell and deliver to him 170 serons of *Ba-*

Where a broker made an entry of a contract in his book which he did not sign, but sent to the vendor and purchaser bought and sold notes, copied from the book and signed by him: Held, that these were a sufficient note or memorandum of the bargain, and that the parties were bound by the contract so made.

1826.

 Goom
against
Aflalo.

barry gum at the price of 55s. per cwt. The broker thereupon wrote in his broker's book the terms of the contract, as follows :

“ *London, 23d February, 1825.* ”

“ Sold for account of Mr. *Aflalo*, to Mr. S. T. *Goom*, 170 serons of *Barbary* gum, subject to approval of quality to-morrow; per the *Mogadore*, lying in the *London Docks*, at 55s. per cwt. in bond; customary allowance for tare and draft; 2½ per cent. discount for cash in fourteen days or four months' credit. The gum remaining in the seller's name at the Docks.”

This entry in the broker's book was not signed by the broker or any other person. Between nine and ten o'clock at night of the said 23d *February*, the broker sent to the plaintiff and defendant respectively paper writings, commonly called bought and sold notes, copied from the entry in his book, and signed by him.

Between nine and ten o'clock in the morning of the 24th *February*, the defendant objected to and returned the sold note to the broker, and wholly refused to deliver the gum, whereupon this action was brought.

Law for the plaintiff. The only question in this case is, whether the want of the broker's signature to the entry in his book is fatal to the plaintiff's right of action. That must depend upon whether there is a sufficient note or memorandum of the bargain signed by an agent duly authorized, so as to satisfy the statute of frauds 29 *Car. 2. c. 3. s. 17.* The case of *Simon v. Motivos* (a) shows that the broker was an agent duly

(a) 5 *Burr. 1921.*

autho-

authorized, and in *Rucker v. Cammeyer* (*a*) it was held that the bought and sold notes signed by the broker were a sufficient memorandum of the bargain. In *Cumming v. Roebuck* (*b*) the same was held by *Gibbs C. J.*, and he there alludes to an opinion somewhere expressed that the entry in the broker's book, signed by him, was the only proper evidence of the agreement, and says that it had been overruled. The case alluded to was probably that of *Hayman v. Neale* (*c*), where the broker signed the entry in his book, and then sent bought and sold notes to the parties. The defendant insisted that the notes were sent for approbation, and that until that had been given there was no binding contract. Lord *Ellenborough* said that the entry made and signed by the broker was alone the binding contract, that the bought and sold notes were only copies of that entry which would be binding although no such notes were ever sent to the vendor or purchaser. The judgment must be considered to have been given with reference to the state of facts then before the Court, and is not applicable to the present case, in which the broker has not signed his book. In *Powell v. Divett* (*d*), decided after *Hayman v. Neale*, the plaintiff, in support of his case, offered in evidence a note signed by the broker, the entry in his book not having been signed. It appeared that the plaintiff had procured an alteration to be made in the note, and on that ground he was nonsuited; but it was not contended there that the note, if unaltered, would not have sufficed. In the late case of *Grant v. Fletcher* (*e*) an opinion is expressed that where the broker's book is

1826.

 Goom
against
Arlaco.

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| (<i>a</i>) 1 <i>Esp.</i> 105. | (<i>b</i>) <i>Holt. N. P. C.</i> 172. |
| (<i>c</i>) 2 <i>Camp.</i> 337. | (<i>d</i>) 15 <i>East</i> , 29. |
| (<i>e</i>) 5 <i>B. & C.</i> 436. | |

1826.

 Goon
against
A. T. L. O.

not signed, the parties are bound by bought and sold notes.

Chitty contrà. The first question in this case is what was intended by the broker to be the original note or memorandum of the bargain. If the entry in his book was intended to be the original note of the bargain, that was the best evidence; and the bought and sold notes were inadmissible. The book, for want of the broker's signature, was not binding, and, consequently, there was no proper evidence of a binding contract. The case of *Powell v. Divett* turned entirely upon the question of fraud, and cannot be considered as an authority for the decision of this question. Then the case of *Hayman v. Neale* is very strong for the defendant. Lord *Ellenborough* begins his judgment by stating, that after the broker has entered the contract in his book, neither party can recede from it. The bought and sold note is not sent on approbation, nor does it constitute the contract. The entry made and signed by the broker is alone the binding contract. It is true, that in *Cumming v. Roebuck*, Gibbs C. J. mentions this doctrine, and says, it has been contradicted. He must have alluded to the case of *Dickenson v. Lilwal* (a), which was decided a few months before *Cumming v. Roebuck*; but it does not warrant the observation. In that case the broker made no entry in his book, but signed and delivered bought and sold notes; *Hinde v. Whitehouse* (b) was cited to show that these were insufficient, but Lord *Ellenborough* said, "That case does not go the length of deciding that where *no entry* is

(a) 1 Stark. N. P. C. 128.

(b) 7 East, 558.

made

made in the broker's book the bought and sold notes may not be sufficient to satisfy the statute;" and his Lordship offered to reserve the point. Here there was an entry in the broker's book, which constitutes an essential difference between the two cases.

1826.

GOOM
against
APLATO.

Cur. adv. vult.

The judgment of the Court was now delivered by ABBOTT C. J. It appears in this case that *Virgo* the broker was authorised by the defendant to sell the goods in question, that he contracted for the sale of them to the plaintiff, entered a memorandum of the bargain in his broker's book, but did not sign that entry, and then sent to each of the parties a copy of the memorandum signed by himself. The only objection to the validity of the contract, is the want of his signature to the memorandum in the book.

It is clear that the contract was made in such a manner as to bind the defendant within the requisites of the statute of frauds. If, therefore, it is to be held invalid, this can only be done on the ground of some usage or custom of merchants, which the Court is at liberty to recognize as a part of the common law. No such usage has been found, or stated as a fact upon the present occasion. There are several cases in the books in which this point has been noticed. They were all quoted in the argument at the bar, and it is unnecessary to repeat them. A signed entry in the broker's book, and signed notes conformable to each other delivered to the parties, are spoken of as making a valid contract: the entry in the book has been called the original, and the notes copies, but there is not any actual decision that a valid contract may not be made by notes duly signed,

1826.

Goon
against
Avlazo.

signed, if the entry in the book be unsigned; and in one case the late Lord Chief Justice *Gibbs* is reported to have spoken of some supposed decision to that effect as having been overruled. Under such circumstances, we cannot say that the rule for which the defendant contends has been adopted by the Court as part of the law merchant. Strong expressions, as to the duty of the broker to sign his book, do not go far enough for this purpose, nor does the obligation to do this, which a broker is supposed to enter into upon receiving a licence to practise in the city of *London*. Brokers are, I believe, established in the principal commercial towns on the continent, under municipal regulations, calculated to obtain punctuality and fidelity in their dealings; and the signature of their book is certainly one method of insuring these, and may in some cases furnish evidence and facilitate the proof of a contract. We have no doubt that a broker ought to sign his book; and that every punctual broker will do so. But if we were to hold such a signature essential to the validity of the contract, we should go further than the Courts have hitherto gone, and might possibly lay down a rule that would be followed by serious inconvenience, because we should make the validity of the contract to depend upon some private act, of which neither of the parties to the contract would be informed, and thereby place it in the power of a negligent or fraudulent man to render the engagements of parties valid or invalid at his pleasure.

For these reasons we think the plaintiff is entitled to retain the verdict.

Postea to the plaintiff.

1826.

RULE OF COURT.

Michaelmas Term, 7 G. 4. 1826.

WHEREAS in and by a rule of this Court made Monday next after the *Octave of the Purification of the Blessed Virgin Mary*, in the fifty-seventh year of his late Majesty King George the Third: IT WAS "ORDERED, that not more than three prisoners be suffered to lodge in one room in the King's Bench Prison at the same time, until the number of prisoners within the prison shall exceed five hundred and forty, and not more than four when they exceed that number, until they exceed seven hundred." IT IS HEREBY FURTHER ORDERED, that not more than five prisoners shall be suffered to lodge in one room in the King's Bench Prison at the same time, until the whole number of prisoners within the prison shall exceed nine hundred.

BY THE COURT.

1826.

*Tuesday,
November 28th.*

CARNE and Others against LEGH.

Where separate actions were brought against several persons for the same debt, who (if at all) were jointly liable, the defendant in one action having paid the debt and costs in that action, the Court stayed the proceedings in the others without costs.

A RULE had been obtained by the defendant in this action to stay the proceedings without payment of costs, and that the plaintiff should pay the costs of the application. The rule was obtained upon an affidavit that the plaintiffs had commenced separate actions against the defendant and two other persons for the same demand, for which they were (if at all) jointly liable, and that the debt and costs in one of the other actions had been paid.

Marryat showed cause, upon an affidavit that the several actions were commenced to recover a debt due to the plaintiffs from the "*Wheat Concord Mining Company*"; that they believed that the several defendants were partners in the concern, but that they refused to admit that fact.

Per Curiam. This being a joint debt the plaintiffs were at liberty to sue all the debtors together, or any one separately, leaving him to plead in abatement; but he had no right to sue all the parties separately for one and the same demand. The rule must be made absolute.

Rule absolute.

Scarlett and N. R. Clarke were to have supported the rule.

1826.

HAM against GREG.

Tuesday,
November 28th.

IN this case issue was joined in last *Easter* term, and notice of trial given for the *London* sittings after that term. The cause was made a remanet to the sittings after *Trinity* term, and then the plaintiff, on account of the absence of a material witness, did not take the record to the marshal for trial. In this term a rule nisi for judgment as in case of nonsuit was obtained.

Meredether showed cause, and contended that, according to the general rule, when a record has once been carried down for trial by the plaintiff, the defendant cannot have judgment as in case of nonsuit, and that this differed from the case of *Gadd v. Bennett* (a), (where it was held that the rule did not apply to *London* causes,) because the delay in that case arose from the act of the parties, in this from the act of the Court.

Where a cause in *London* was made a remanet from the sittings after *Easter* to the sittings after *Trinity* term, and the plaintiff then made default: Held, that the defendant was entitled to move for judgment as in case of nonsuit.

Campbell, contrà, contended that in *Gadd v. Bennett* the rule was laid down in general terms, that judgment as in case of nonsuit may be had after a cause has been made a remanet in *London* or *Middlesex*.

Per Curiam. There is a great difference between causes entered for trial in *London* or *Middlesex* and at the assizes in other counties. In the former the record is not re-entered, nor is any fresh notice of trial given,

(a) 2 B. & A. 709.

the

1826.

HAM
against
GREG.

the cause comes on as if the sittings had been continued without interruption. The defendant is therefore entitled to move for judgment as in case of nonsuit.

The plaintiff then consented to give a peremptory undertaking, and the rule was discharged.

*Tuesday,
November 28th.*

DOE on the several demises of GEORGE CATES the Elder, T. CARR, J. WEIR, ELIZABETH STAFFICK, EDWARD JONES, and GEORGE HICKS *against* The Rev. W. SOMERVILLE, W. DIGBY, Esq., S. BEAUFOY, The Rev. H. BELLAIRS, The COVENTRY Canal Company, J. COX, J. CHILWELL, W. JENKINS, T. JOHN-SON, T. KELLEY, C. M'TAGGART, P. W. WILLIAMS, J. SMITH, J. SPARROW, J. P. SHAW, D. THOMAS, W. THOMAS, J. WORRARD, ELIZABETH WHEATLEY, and THOMAS HEATHCOTE.

A rector in December 1816, granted, bargained, sold, gained, and demised the rectory and all the glebe lands, tithes, &c. to a trustee for securing an annuity for a term of years, if he the rector should so long

live. This conveyance having been made after the passing of the 43 G. 3. c. 84., and before the passing of the 57 G. 3. c. 99., was held to be a valid conveyance, and to pass the legal estate to the trustee.

The rector succeeded to the rectory, upon the death of the former incumbent, in April 1816. A. and B. were then in possession of the glebe lands, having been tenants of the former incumbent, and they continued in possession until after December 1816, when the rector conveyed them to the trustee for securing the annuity: Held, that the latter could not maintain an ejectment against A. and B. without giving them a notice to quit.

subject

subject to the opinion of this Court as to the plaintiff's right to recover the whole, or any part of the premises, on the following case :

The Honourable and Reverend *Edward Finch* became rector of the rectory of *Bedworth*, in the county of *Warwick*, on the 13th day of *April* 1816, on a vacancy by the resignation of the last incumbent, and vicar of the vicarage of *Meriden*, in the county of *Warwick*, on the 29th day of *March* in the same year, on a vacancy by the death of the last incumbent ; and being such rector and vicar, by a certain indenture, bearing date the 20th of *December* 1816, in consideration of 600*l.* granted for his life to Mr. *George Cates* an annuity of 100*l.*, charged upon the rectory of *Bedworth* and vicarage of *Meriden*, with the usual powers of distress and entry, in case of the annuity being in arrear, and for better securing the annuity, and in consideration of 10*s.*, the said *Edward Finch* did by the said indenture grant, bargain, sell, and demise unto *William Hicks*, his executors, &c., all and singular the said rectory of *Bedworth* and vicarage of *Meriden*, in the county of *Warwick*, and all the glebe lands, messuages, or tenements, tithes, tenths, oblations, obventions, profits, and emoluments arising from the said rectory and vicarage, habendum to the said *Hicks*, his executors, &c., for and during the term of 100 years thence next ensuing, if the said *E. Finch* should so long live, and his interest therein so long continue, at a pepper corn rent, upon trust, for better securing the due payment of the annuity, and all costs, &c., by the ways and means therein mentioned, and upon further trust, that until the annuity should be in arrear by the time therein mentioned, and also when and so often as all arrears of the annuity, and the costs, &c. should be raised

1826.

Don dem.
CATES
against
SONERVILLE.

1826.

—
Dox dem.
CATES
against
SOMERVILLE.

raised or fully satisfied and paid, to permit and suffer the said *Edward Finch*, his executors, &c., to receive and take the rents, oblations, produce, and profits of the said rectory, vicarage, glebe lands, messuages, tithes, tenths, emoluments, and appurtenances, to and for his or their own use and benefit; and upon further trust, that, after paying the annuity and such costs, &c., to pay to the said *Edward Finch* or his assigns, or to whom he or they should direct or appoint, the money, if any, which from time to time should remain in the hands of *William Hicks*, his executors, &c., unapplied to any of the purposes aforesaid. *William Hicks* died on or about the 26th of December 1819, leaving *Edward Jones* and *George Hicks*, two of the lessors of the plaintiff, his executors. Ten writs of fieri facias or judgments in debt entered up in or as of *Trinity term*, 1819, at the suit of various creditors of *Edward Finch*, having been, on the 26th day of *June* in the same year, issued against him, and directed to the sheriff of *Warwickshire*, and the sheriff having thereupon returned "nulla bona," and that *Edward Finch* was a beneficed clerk, having no lay fee, ten writs of levavi facias de bonis ecclesiasticis were, on the 3d day of *July* 1819, issued to the then Bishop of *Lichfield* and *Coventry*, within whose diocese the rectory of *Bedworth*, and the vicarage of *Meriden* are situate, who, upon receipt of those writs, granted to *William Mott*, Esq. sequestrations, dated respectively the 8th of *July*, in the last-mentioned year, of the rents, tithes, oblations, obventions, fruits, issues, and profits, and other ecclesiastical goods of *Edward Finch* belonging to the said rectory and vicarage, by the first of which sequestrations the sequesterator was empowered to levy, sue for, and receive, and to dispose of the rents,

rents, tithes, &c., to the end that thereout the charges of duty and serving the cures in the churches and throughout the parishes of *Bedworth* and *Meriden* aforesaid, by ministers to be nominated or approved by the bishop for the time being, with such stipend as he should appoint for so doing, and all other burdens, ordinary or extraordinary, incumbent on the said rectory and vicarage, and on *Edward Finch*, as rector and vicar thereof, might be in the first place paid and discharged by the sequestrator, and the remainder rendered to *W. Little*, *J. Woodcock* the elder, *J. Woodcock* the younger, (the creditors named in the first writ of *levi facias*,) for their debt and damages in the said writ mentioned; provided that the sequestrator should during the sequestration render to the bishop a true account of what he should receive and discharge in that behalf. All the sequestrations were of the same date, and in the same form, except that those issued after the first were made subject to the prior ones. A witness stated that he had since 1822 received the rents of the tenants of the premises belonging to the vicarage of *Meriden*, and paid them over to the sequestrator. The Rev. *Henry Bellairs*, curate of *Bedworth*, and the Rev. *William Somerville*, curate of *Meriden*, two of the defendants, were in the respective occupation of the parsonage houses of the said rectory or vicarage, and of lands adjoining thereto. The other defendants were tenants of premises belonging either to the rectory or vicarage, and some of them, viz. the *Coventry Canal Company*, *J. Car*, *J. Chilwell*, *W. Jenkins*, *T. Kelley*, *J. Smith*, *J. Sparrow*, *J. P. Shaw*, *J. Worrall*, and *E. Wheatley*, occupied the premises in their possession as tenants to the former

1826.
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*Deo dom.
Cates
against
Somerville*

1826.

Deo dem.
Cates
against
SOMERVILLE.

incumbent previously to Mr. *Finch*'s becoming rector and vicar, and had ever since continued in such occupation. Mr. *Finch* was proved to be living at the island of *Mauritius* in *October* 1824. This case was argued in *Trinity* term by

Goulburn for the lessors of the plaintiff. The legal estate in the premises in question is in *E. Jones* and *George Hicks*, the executors of *W. Hicks*, the trustee of the term for securing the annuity. The statute 13 *Eliz.* c. 20., which declared void all charges of benefices with cure with any pension, &c. &c., was repealed by the statute 43 *G. 3.* c. 84. s. 10., but was partially revived in 1817 by the statute 57 *G. 3.* c. 99. s. 1. The grant of the annuity in question was made in 1816, while the statute of the 43 *G. 3.* was in force, and is therefore valid. *White v. The Bishop of Peterborough* (*a*) and *Silver v. The Bishop of Norwich* (*b*) are authorities to show that the legal estate in the premises is in the lessor of the plaintiff. *Co. Litt.* 45 *a.* shows that this grant is valid, during the life of the incumbent, against him and all claiming under him. But then it will be said that some of the defendants were tenants to the former incumbent, and that having continued to hold since Mr. *Finch* became incumbent, they became his tenants, and are entitled to a notice to quit. Their tenancies determined by the death of the former incumbent, and there is no fact stated in the case from which it can be inferred that Mr. *Finch* ever acknowledged them as his tenants.

(*a*) 3 *Swarst.* 109.

(*b*) *Ibid.* 112, in a note.

Hollech

Holbeck contra. It must be conceded that there are authorities to show, that a lease by a rector is good during his life against him and those claiming under him; although in *Revell v. Hart* (a) the point was doubted; and in *Frogmorton v. Scott* (b) it was held that a rector might recover in ejectment against his lessee, on the ground of the lease being void by his own non-residence. But the question in this case is, whether the lessors of the plaintiff can recover against these defendants. In *Errington v. Howard* (c), a rector entitled to an annual stipend in lieu of tithes assigned it by way of mortgage, afterwards a creditor of the rector having obtained judgment, and in the regular course a sequestration of the stipend, the Master of the Rolls held that the mortgagee should be preferred to the judgment creditor, *but without prejudice to the 50l. per annum allowed by the ordinary* for performing the cure. By this ejectment the plaintiff seeks to take the whole profits of the rectory. Suppose, in order to have the cure supplied, the bishop, without any writ of fieri facias, had sequestered, could this ejectment have been maintained? Then as to those defendants who were tenants to the former incumbents, there is sufficient to show that they became tenants to *Finch*. They have continued in occupation of the premises ever since, and a letting by *Finch* to them prior to the grant of the annuity may be presumed. They are not trespassers, but at least tenants by sufferance.

Cur. adv. vult.

ABBOTT C. J. now delivered the judgment of the

(a) *Gouldab.* 139.

(b) *2 East,* 467.

(c) *Ambi.* 485.

K 2

Court.

1826.

Dor dem.
Cates
against
Somerville.

1826.

Dos. dem.
CATES
against
Somerville

Court. Having first stated the facts of the case, he proceeded as follows:

Upon the first question reserved in this case, we are of opinion that the lessors of the plaintiff, *Jones* and *Hicks*, had the legal estate in the premises in question, as executors of *Wm. Hicks* the trustee of the term granted for securing the annuity by the indenture of the 20th of *December 1816*. The statute 13 *Eliz. c. 20.* had been repealed before the date of this indenture, and the statute 57 *G. S. c. 99.* had not then passed, so that there existed at the time no statute against the validity of this grant, and the grant consequently was good during the incumbency of the grantor.

Upon the second question we are of opinion, that the persons who were in possession as tenants prior to the incumbency of Mr. *Finck* were entitled to a notice to quit. The occupiers in *Bedworth* had been in possession for eight months, and those in *Meriden* for nine months, between Mr. *Finck's* promotion and the grant of the annuity, and they had not been disturbed. After such a lapse of time, we think Mr. *Finck* must be presumed to have assented to the continuance of their tenancy under the same terms as before, and that he could not have dispossessed them without a notice to quit; and if he could not, neither could any person claiming under him.

The verdict, therefore, is to be entered for the ten defendants who fall under this description; but, as against all the others, it must be entered for the plaintiff. No question properly arises in this case as to the authority of the bishop to place a curate in the parsonage house under a sequestration, and in the absence of the incumbent, because it does not appear that Mr.

Somer-

Somerville or Mr. Bellairs had been placed in the houses by the bishop, or even that either of them had been nominated or approved of by him according to the provision of the sequestration.

1826.

Dox dem.
CATES
against
SOMERVILLE.

SOPHIA NYE, Spinster, HENRY NYE and CHARLES NYE, Infants, by the said S. NYE, their Mother and next Friend, *against* JOHN MOSELEY.

THE Vice-Chancellor sent the following case for the opinion of this Court :

In the year 1808 *Sophia Nye* became the servant of *John Moseley*, and continued to live in his family in the capacity of cook until the year 1812.

John Moseley was at the time of *Sophia Nye's* becoming his servant, and has ever since continued to be, a married man living with his wife, but had at the time aforesaid ceased to have sexual intercourse with his wife by medical advice. In the course of the year 1810 a cohabitation took place between *J. Moseley* and *S. Nye*, previously to which *S. Nye* had always conducted herself with propriety and morality ; and she continued to live in *J. Moseley's* family, and to cohabit with him until the year 1812, when he provided and fitted up a cottage for her in the neighbourhood of his residence, and she removed to and resided at such cottage, and cohabited with him there till the year 1816. In the course of such cohabitation *S. Nye* was delivered of one child, and was at the determination thereof in a state of pregnancy, and has since been delivered of another child. In 1816 *J. Moseley* determined such cohabitation, and at the time

A married man, living in the same house with his wife, cohabited for six years with another woman, who knew that he was married, but until that time had conducted herself with propriety and morality. At the expiration of that time he ceased to cohabit with her, and gave her a bond to secure an annuity to her for her life, and the payment of a sum of money as a provision for her children, which she had borne to him during such cohabitation : Held, that an action at law might be maintained upon this bond.

1826.

 Nye
 against
 Moseley.

of determining such cohabitation he executed a bond to the said *S. Nye*, conditioned for the payment of an annuity of 100*l.* to her for the term of her natural life, and for the payment of 500*l.* each to the said children at his death. The annuity is unpaid for one year. The question for the opinion of this Court was, whether the circumstances of the case afforded to *J. Moseley* a good ground of defence at law, to an action brought by *S. Nye* against him upon the bond to recover the arrears of the annuity?

Storks for the plaintiff. An action at law is maintainable upon this bond, for the facts stated in the case afford no defence, unless it is to be laid down as a general principle, that a married man cannot contract an obligation to provide for a woman with whom, while he was a married man, he has illicitly cohabited. The general rule is, that a bond given in consideration of future cohabitation is void, but that a bond given in consideration of past cohabitation is good, *Walker v. Perkins* (*a*), *Turner v. Vaughan* (*b*), *Lady Cox's* case (*c*). Here, the consideration for the bond was *past* cohabitation. But it will be insisted in this case, that although the above rule be generally true, it does not apply to this case, because the obligor was a married man during the time he cohabited with the obligee, and she knew him to be so. The case of *Priest v. Parrot* (*d*) will be relied upon. There a bill for payment of a sum of money and an annuity secured by a deed-poll was filed by a young woman who had been seduced by a

(*a*) 3 *Burr.* 1568.

(*b*) 2 *Wils.* 539.

(*c*) 3 *P. Wms.* 339.

(*d*) 2 *Ves.* 160.

married

married man in whose family she lived as companion to his wife, and who by continuing to live with him occasioned a separation, and the bill was dismissed. It does not appear from the report of that case whether the bond was given to induce future cohabitation : here the bond was not given *until* the illicit intercourse had ceased. The object of the obligor was to make some reparation for the injury he had done to the woman, by providing for her and her children ; and a man who does a wrong surely ought to have it in his power to make reparation. In *Annandale v. Harris* (*a*), the Marquis of *Annandale* having seduced an innocent woman, and having had a child by her, gave her a writing, obliging himself to pay her 2000*l.* after his death, for the purchasing of an annuity for her and the child for their lives, and performance of this agreement was *enforced* by a court of equity. It does not appear distinctly whether the Marquis was a married man during the cohabitation ; but Lord *Hardwicke* says in that case, " If a man does mislead an innocent woman, it is both reason and justice that he should make her a reparation." In *Spicer v. Hayward* (*b*) the plaintiff seduced his wife's sister, and had several children by her, and gave her some bonds for payment of money, as a provision for her and her children ; and these bonds being put in suit, he filed a bill, suggesting that there was no valuable consideration for them, and the bill was dismissed with costs. In that case the plaintiff was married during the cohabitation, and the woman must have known it. The holding such bonds to be void will have a tendency to prolong the illicit intercourse, because it will then be

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(*a*) 2 P. Wms. 432.(*b*) Cha. Prec. 114.

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the woman's interest to prevail upon the man to continue to live with her.

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Lovatt contra. The bond in this case is void, because it was given by a married man to a single woman with whom he had cohabited, he, during the whole period of that cohabitation, having been a married man, and known to the woman to be such. It may be conceded that a mere voluntary bond is good, both at law and in equity. The principle upon which a bond, the consideration for which is future cohabitation, has been held to be void, is, that it has a tendency to encourage vice and immorality. A bond given to the woman during the continuance of the cohabitation must be void upon the same principle, because the continuance of the cohabitation must in that case be presumed to be part of the consideration; and if the question were now raised for the first time, there would be ample ground for contending that a bond, for which the consideration was past cohabitation, would be void also, because the very hope of obtaining such a bond has a tendency to cause the continuance of the intercourse. It must, however, now be conceded, that such a bond given by a single man is good. It is allowed to be enforced upon the principle, that the sum secured by the bond is considered in the nature of voluntary damages agreed to be paid by the obligor as a compensation for the injury done to the woman. Now what is the nature of that injury? It is not her seduction; for that, by the law of *England*, is considered not to be any injury to the woman, but to the person only who is entitled to her services. The injury is a presumed breach of a promise of marriage. Where the parties are both unmarried,

there

there is ground for presuming that a promise of marriage has been made, and if so, an actual injury is done to the woman herself by the breach of that promise, and for that injury damages might be recovered in an action at law. The sum secured by the bond is then considered to be the voluntary damages which the party who committed the injury agreed to pay as a compensation for the injury. But if during the whole period of the co-habitation the man was married, and the woman knew that fact, it is clear that there could be no promise binding upon him to marry her, so long at least as his wife lived. There is no instance in which such a bond given by a married man has been held to be good, and that is a strong argument against its validity. The case of *Spicer v. Hayward* (*a*) is not in point, because it proceeded upon the ground, that a court of equity would not interfere where both parties were in pari delicto. In *Annandale v. Harris* (*b*) it is clear that the Marquis was not a married man during the cohabitation, for it appears, from the report of that case, in 3 *Brown's Parliamentary Cases*, 445., that the illicit connection commenced in *May 1717*, and that the bond was executed in *September 1718*. Now, in fact, the Marquis married his first wife in 1682; she died in 1716, and he married his second wife on the 14th of *November 1718*; and Lord *Hardwicke*, in observing upon that case, in the course of his judgment in *Priest v. Parrot* (*c*), says, "that the commerce was wholly after the death of the first wife, and before the second marriage." There can be no doubt that his opinion in *Priest v. Parrot* was, that the fact of a man's being married, and known to

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Moore, Esq.

(a) *Chas. Prec.* 114. (b) *2 P. Wms.* 432. (c) *2 Ves.* 160.

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the woman so to be, vacated the deed. That case was cited in *Matthews v. L*—*e(a)*, and *Hunt v. Maunsell(b)*, as a decision to that effect; and its authority was never disputed.

BAYLEY J. It is clearly established, that a bond given to a single woman by a single man, as premium pudi-
 citie, at the time when he determines the illicit connec-
 tion, is valid between the parties. In such a case, it is true,
 the woman has been guilty only of fornication. But for-
 nication is immoral as well as adultery. Both are offences
 punishable in the spiritual court. In the latter, there is
 undoubtedly a greater degree of immorality than in the
 former. But it is extremely difficult for a court of law
 to measure precisely the different degrees of immorality,
 and to say that an act shall be void, where the party
 who seeks to take advantage of it has been guilty of
 one degree of immorality, but that it shall be valid where
 the party has only been guilty of a less degree of immo-
 rality. It having been once established, that a bond
 given to secure a provision to a woman who has lived
 with a man in a state of fornication is valid, my pre-
 sent impression is, that we ought not to hold that a
 bond given to a woman who has lived with a man in a
 state of adultery is void, because in one case the woman
 has been guilty of a greater degree of immorality than
 in the other. *Priest v. Parrot* is by no means a deci-
 sive authority to show that such a bond may not be
 enforced in a court of law; for the decree was that the
 bill should be dismissed; and that decree may have
 proceeded on the ground that the bond might be en-
 forced at law. If the decree had been that the bond

(a) 1 Mad. 558.

(b) 1 Dow. 211.

should

should be delivered up to be cancelled, then it would have been a strong authority in support of the position contended for on the part of the defendant.

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The following certificate was afterwards sent.

This case has been argued before us by counsel. We have considered it, and are of opinion that the circumstances of this case do not afford a good ground of defence at law to an action by the said *Sophia Nye* against the said *John Moseley*, upon the said bond, to recover the arrears of the said annuity.

J. BAYLEY.

G. S. HOLROYD.

J. LITTLEDALE.

The KING *against* T. M. HUBBALL.

THIS was an information in quo warranto against the defendant for usurping the office of a justice of the peace within the borough of *Stafford*. The plea set out the charter of the 12 *Jac. 1.*, by which the king

To an information for usurping the office of justice within a borough, defendant pleaded that he was elected at a

corporate meeting, where a majority of the aldermen and capital burgesses were present. Replication, that at the supposed election, five capital burgesses (described by their names), and no others, were present, and that they were not the major part of the capital burgesses. Rejoinder, that at the election, besides the five capital burgesses named in the replication, there were present *X.* and *T.*, being then capital burgesses, and that the five capital burgesses named in the replication, together with *X.* and *T.*, were the major part of the capital burgesses. Surrejoinder, that *X.* and *T.*, before the election of the defendant, had been elected, admitted into, and exercised the office of aldermen, and at the election of the defendant were present as aldermen, and that before the defendant's election two other persons were elected, and admitted as capital burgesses in the room and stead of *X.* and *T.*. Rebutter, that at the election of *X.* and *T.* as aldermen of the borough, the major part of the aldermen were not assembled, and that after the election of *X.* and *T.*, and before the election of the defendant as justice, and whilst *X.* and *T.* exercised the office of aldermen, informations in quo warranto were filed against them, and judgment of ouster given, with a traverse that *X.* and *T.* ever were aldermen. Demurrer: Held, that notwithstanding the judgment of ouster *X.* and *T.* could not be considered as having attended at the election of the defendant as capital burgesses, and that judgment must be for the crown.

granted

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granted that the corporation should consist of a mayor, ten aldermen, and ten capital burgesses; that the mayor, aldermen, and others of the common council of the borough for the time being, or the greater part of them, of whom the mayor for the time being was to be one, should have full power to choose and nominate, within the borough, two of the aldermen of the borough for the time being to be the justices within the borough for one whole year. The plea then stated the acceptance of the charter by the corporation, and that on the charter-day in the year 1825, the then mayor, and divers, to wit, six of the aldermen, and divers, to wit, six others of the common council of the borough, to wit, six of the capital burgesses of the borough for the time being, they being the major part of the mayor, aldermen, and capital burgesses of the borough, did, within the borough, choose and nominate the defendant, being one of the aldermen of the borough for the time being, to be one of the justices of the peace within the borough for one whole year then next following; and that he, after he was so nominated and chosen, took the requisite oath, and was thereupon duly admitted into, and did take upon himself the office of justice of the peace within the borough, &c., and by that warrant exercised the office. To this plea there were several replications; but the points discussed at the bar and decided by the Court arose upon demurrer to the pleadings following upon the sixth replication, which alleged, that at the supposed election of the defendant in the plea mentioned, the following persons and no others were present, and attended as capital burgesses of the borough: *J. Shaw, J. Griffin, J. Marsh, E. Worsey, and J. Rogers;* and that the said persons who so attended and were present

sent as capital burgesses at the said supposed election of the defendant were *not* the major part of the capital burgesses of the borough. And this, &c. Rejoinder, that at the said election of the defendant the said *J. Shaw, J. Griffin, J. Marsh, E. Worsey, and J. Rogers*, being capital burgesses of the borough, attended and were present, as in the replication mentioned; and that over and above and besides the said five last-mentioned capital burgesses, *E. Knight* and *R. Turnock*, being then capital burgesses of the borough, attended and were present at the same election, and that the said five capital burgesses of the borough who so attended and were present at that election, and the said *E. Knight* and *R. Turnock*, so then being capital burgesses of the borough, were the major part of the capital burgesses of the borough. And this, &c. Surrejoinder, that *Knight* and *Turnock*, before the supposed election of the defendant, were respectively elected and chosen aldermen of the borough, and had taken their corporal oath as aldermen of the borough, and had been admitted into the office of aldermen of the borough; and that *Knight* and *Turnock* had from thence hitherto exercised the office of aldermen of the borough, and at the supposed election of the defendant attended and were present as aldermen of the borough; and that after the said election of *Knight* and *Turnock* as aldermen, as aforesaid, and before the supposed election of the defendant, two other persons, to wit, *J. Hawthorn* and *J. Rogers* were elected and chosen capital burgesses, and took their corporal oath, and were admitted as capital burgesses of the borough in the room and stead of *Knight* and *Turnock*. And this, &c. Rebutter, that at the time of the supposed election of *Knight* to be alderman

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of the borough, the major part of the aldermen of the borough were not assembled or present, nor did meet, and that the supposed election of *Knight* to be such alderman took place without the major part of the aldermen of the borough having assembled or met or having been present thereat; and that after the supposed election of *Knight* to be such alderman, and before the election of the defendant, and whilst *Knight* exercised the said office of alderman under and by colour of his supposed election and not otherwise, *to-wit*, in *Michaelmas* term in the 6 G. 4. a certain information in the nature of a quo warranto was duly exhibited against *Knight*, charging that he on the 2d of *October*, 2 G. 4. did use and exercise without any legal warrant the office of an alderman of the borough, &c. And thereupon that *Knight* in *Hilary* term in the 6 & 7 G. 4. A. D. 1825, having heard the said information read, disclaimed the office in the information specified, and could not deny that he had usurped upon our lord the king the said office, and confessed and acknowledged the said usurpation in manner and form as in the said information above alleged; and thereupon it was adjudged that the said *Knight* should not further intermeddle with or concern himself in or about the said office, but that he should be absolutely forejudged and excluded from using or exercising the same. The rebutter then stated a similar information and a judgment of ouster against *Turnock*, and then traversed that *Knight* and *Turnock* ever were elected and chosen aldermen. And this, &c. Demurrer.

Campbell was heard in support of the demurrer, and *R. Bayly* contra.

ABBOTT

ABBOTT C. J. The defendant alleges in his plea that he was chosen a justice of the peace for the borough of *Stafford*, at an assembly where a majority of the aldermen and capital burgesses attended. The prosecutor in one of his replications denies that the major part of the capital burgesses were present, and if he had done no more, the question now raised upon demurrer would have arisen upon the evidence. But the prosecutor has gone further, and in his sixth replication states that five persons, whose names are therein mentioned, and no others, were present as capital burgesses at the election of the defendant, and that those five persons were not the major part of the capital burgesses of the borough. Now as five certainly are not a majority of ten, it may be said that this is an argumentative replication. But if the defendant had intended to insist that it was bad on that ground, he ought to have demurred specially. Instead of so doing, he by his rejoinder goes on to show that more than five persons did attend as capital burgesses. The rejoinder states, that at the election of the defendant the five capital burgesses mentioned in the replication attended, and that over and above and besides those five, *Knight* and *Turnock*, being also capital burgesses, attended and were present, and that the five capital burgesses named in the replication, and *Knight* and *Turnock* so then being capital burgesses, were the major part of the capital burgesses of the borough. The prosecutor in his surrejoinder states, that before the election of the defendant, *Knight* and *Turnock* had been elected, admitted to, and exercised the office of aldermen, and that they at the supposed election of the defendant attended and were present as aldermen; and that after the election of *Knight* and *Turnock* to the office of

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of aldermen, and before the supposed election of the defendant, two other persons were elected and admitted as capital burgesses in the room of *Knight* and *Turnock*. It may be said that this surrejoinder is also argumentative; but the defendant, in order to insist that it was bad on that ground, ought to have demurred specially. Instead of that, he by his rebutter goes on to show that at the time of his election *Knight* and *Turnock* were not aldermen, but capital burgesses; for in the rebutter he states, that in *Michaelmas* term 1825 judgment of ouster was had against them on an information of quo warranto, which stated that they in *October* 1822 usurped the office of aldermen, and then it concludes with a traverse of the fact that *Knight* and *Turnock* ever were chosen aldermen. The defendant insists that the legal effect of the judgment of ouster is, that they never having been duly elected aldermen continued to be capital burgesses. Now that was the very point before the Court in *The King v. Hughes*. In that case it was decided by my three learned brothers, in my opinion most properly, that *Knight* and *Turnock* at the election could not be considered to be capital burgesses. I am therefore of opinion that, upon this part of the pleadings, there must be judgment for the crown.

Judgment for the crown.

~~1456.~~

The KING against ELLIS.

A N indictment, charging the prisoner with feloniously stealing six shillings, the property of *S. Newman*, was found at a gaol delivery for the city of *Exeter*, and was afterwards, on the motion of the prisoner, supported by affidavits that great prejudice existed against him at *Exeter*, removed into this Court by certiorari; and an order was made that the jury, to try the indictment, should be drawn from the body of the county of *Devon*. The prisoner was accordingly tried before *Littledale* J., sitting at Nisi Prius at the last Summer assizes for *Devon*, and found guilty. At the trial the following facts were proved. The prisoner was a shopman in the employ of the prosecutrix, and his honesty being suspected, on a particular day the son of the prosecutrix put seven shillings, one half crown, and one sixpence, marked in a particular manner, into a till in the shop, in which there was no other silver at that time, and the prisoner was watched by the prosecutrix's son, who from time to time went in and out of the shop, occasionally looking into and examining the till, while customers came into the shop and purchased goods. Upon the first examination of the till it contained 11s. 6d., after that the son of the prosecutrix received one shilling from a customer and put it into the till, afterwards another person paid one shilling to the prisoner, who was observed to go with it to the till, to put his hand in and to withdraw it clenched. He then left the counter, and was seen to raise his hand clenched

Where several felonies are so connected together as to form part of one entire transaction, evidence of them all may be given in order to prove a party indicted guilty of one.

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to his waistcoat pocket. The till was examined by the witness, and 11s. 6d. were found in it, instead of 13s. 6d., which ought to have been there. The prosecutor was proceeding to prove other acts of the prisoner, in going to the till and taking money, when *Wilde Serjt.* objected, that evidence of one felony had already been given, and that the prosecutrix ought not to be allowed to prove several felonies. The learned Judge overruled the objection, and the son of the prosecutrix proved that, upon each of several inspections of the till after the prisoner had opened it, he found a smaller sum than ought to have been there. Upon one occasion there was 8s. 6d. in it, and the witness observed, that most of that money was marked, he then put in 1s. 6d. more, and upon examining again found only 6s. 6d. He then caused the prisoner to be apprehended and searched, and 14s. 6d. were found upon him, six of the shillings being part of the money marked by the witness, and placed in the till the same morning. The counsel for the prosecution said, that he relied upon the taking of the 8s. 6d. after the witness had added 1s. 6d. to the 8s. 6d. which was then in the till, and desired that the other takings might be excluded from the consideration of the jury. The prisoner having been found guilty,

Praed, within the first four days of the term, had moved for a rule for staying the judgment; and it was then intimated by the Lord Chief Justice, that although it was usual to confine the prosecutor to the proof of one single act of felony, yet where the character of the particular act with which the prisoner was charged was to be collected from other acts done by him, all of them constituting one entire transaction, it was discretionary in the Judge

Judge to allow the prosecutor to go into the whole; that it would, however, be competent to the prisoner's counsel, when he was brought up for judgment, to urge any matter to the Court to induce them to stay the judgment. The prisoner upon a subsequent day being brought up for judgment, *Chitty* and *Praed* renewed the application. They urged, that as it appeared at the different times when the witness went to the till money had been taken from it, if the money taken each time was part of the marked money, each taking would be a distinct felony, and the prosecutor ought to have been confined in proof to one felony, otherwise the prisoner, if afterwards indicted for any of those felonies, could not possibly plead *autefois convict*. If, on the other hand, all the marked money was taken at one time, the other takings amounted to embezzlement, and in that case evidence of an offence different from that which was the subject of the indictment had been received. The prosecutrix ought to have been compelled to make her election, and in consequence of that not having been done, the prisoner has been injured by the evidence which has been given.

C. F. Williams and *Coleridge*, contrà, were stopped by the Court.

BAYLEY J. I think that it was in the discretion of the Judge to confine the prosecutor to the proof of one felony, or to allow him to give evidence of other acts, which were all part of one entire transaction. Generally speaking, it is not competent to a prosecutor to prove a man guilty of one felony, by proving him guilty of another unconnected felony; but where several felonies

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lories are connected together, and form part of one entire transaction, then the one is evidence to show the character of the other. Now all the evidence in this case tended to show that the prisoner was guilty of the felony charged in the indictment. It went to show the history of the till from the time when the marked money was put into it up to the time when it was found in the possession of the prisoner. I think, therefore, that the evidence was properly received.

HOLROYD J. Upon an indictment for robbing the prosecutor of a coat, the robbery having been committed by the prisoner's threatening to charge the prosecutor with an unnatural crime, I received evidence of a second ineffectual attempt to obtain a 1*l.* note from the prosecutor by similar threats, but reserved the point for the consideration of the Judges, and they were of opinion that the evidence was admissible, to show that the prisoner was guilty of the former transaction, *Rex v. Egerton.* (a)

The counsel for the prosecution offered affidavits in aggravation of punishment; but they were refused, the Master certifying, that it was contrary to the practice to receive affidavits in cases of felony.

The prisoner was adjudged to be transported for seven years. (b)

(a) *R. & R. C. C. 375.*

(b) See *Rex v. Wydie*, 1 N. R. 92.

A

T A B L E

OF THE

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ARGUED AND DETERMINED

1827.

IN THE

Court of KING's BENCH,

IN

Hilary Term,

In the Seventh and Eighth Years of the Reign of
GEORGE IV.

BOVILL and Another, Assignees of the Estate Thursday,
January 25th.
and Effects of ANSTICE and THORNHILL,
Bankrupts, against HAMMOND.

ASSUMPSIT for money had and received to the use of the plaintiffs as assignees. Plea, the general issue. At the trial before Abbott C. J., at the London sittings after last Michaelmas term, it appeared that the bankrupts and the defendant in February 1826 had entered into an agreement to apply to one Bottomley, the owner of the ship *Earl of Liverpool*, for permission to advertise her for *Van Diemen's Land*, they undertaking to procure a full cargo for certain commission to be paid to them jointly, and one of them receiving on account of such commission a certain sum of money: Held, that the other could not maintain money had and received for a moiety, the demand arising out of a partnership transaction, and no account having been settled between them. *Bayle J. dub.*

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BOVILL
against
HAMMOND.

paid to them, of which the bankrupts were to receive one moiety, and the defendant the other. The owner of the vessel acceded to their proposal; the ship was advertised, and both parties exerted themselves to procure cargo and passengers. When the ship was about half laden *Anstice* and *Thornhill* became bankrupts, but they continued to take a share in the trouble of procuring cargo. The defendant made all disbursements, and received all the monies that were paid for the use of the owners. The vessel sailed in *May* 1826, and the defendant afterwards rendered an account to the owners, containing a statement of his disbursements, and a claim of 65*l.* for commission. The owners admitted that the account of disbursements was correct, but refused to settle the account, because they said the defendant had claimed 5*l.* too much for commission. The defendant had received and retained in his hands sufficient to pay all the disbursements made by him, and the 65*l.* claimed for commission. For the defendant it was objected, that the agreement entered into between the bankrupts and defendant made them partners, and that, consequently, this action could not be maintained. The Lord Chief Justice was of that opinion, and directed a nonsuit, but gave the plaintiffs leave to move to enter a verdict for 30*l.*

Gurney now moved accordingly, and contended, that this did not fall within the general rule as to partnership transactions. All disbursements were made, and all monies received by the defendant. He had stated an account with the owners of the vessel, whereby he admitted to have in his hands 65*l.*, which he claimed as commission. They disputed 5*l.* only, the plaintiffs were, therefore,

therefore, clearly entitled to a moiety of the residue,
amounting to 30*l.*

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against
HAMMOND.

ABBOTT C. J. I am of opinion that we ought not to disturb the nonsuit in this case. It is a general rule, that between partners, whether they are so in general or for a particular transaction only, no account can be taken at law. These parties have never settled any account between themselves; and the only ground on which this case is distinguishable from former decisions is, that all monies have been received and paid by one partner. That certainly makes an account between them less necessary; but if we, therefore, held this action to be maintainable, I think we should be breaking down a general rule and introducing nice distinctions, which it is much better to avoid.

BAYLEY J. I think there is so much doubt in this question, that a rule ought to be granted. All the disbursements were made by the defendant. He then stated an account shewing what he had received, and made a claim for disbursements and commission. To the former the owners accede, and to a great proportion of the latter also. Having received that, and all other partnership items being settled, I do not think that the policy of the general rule requires us to hold, that a court of equity must be resorted to in order to settle the account between these parties.

LITTLEDALE J. It appears that neither the bankrupts nor the assignees ever assented to the account rendered by the defendant to the owners of the ship; nor is it

M 2

finally

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finally settled even by them. It appears to me, therefore, that the case falls within the general rule, and that the nonsuit was right.

Rule refused.

**The KING *against* The Justices of the North
Riding of YORKSHIRE.**

By the 13 G. 3.
c. 78. surveyors
of highways are
required to ex-
hibit their ac-
counts before
one magistrate,
and if he re-
fuses to allow
them, such
parts as he
objects to are
to be investi-
gated by the
justices at petty
sessions.
Where sur-
veyors exhibited
their accounts
before one
magistrate, but
did not take
the assessments
with them, for
which reason
the magistrate
did not proceed
to investigate
the accounts,
but referred the
whole of them
to the justices
at petty ses-
sions, by whom
they were al-
lowed; Held,
that such allow-
ance was
invalid.

CAMPBELL had obtained a rule nisi for quashing an order of petty sessions, for allowing the accounts of the surveyors of the highways of the township of *Fylingdales*, in the parish of *Whitby*, in the North Riding of Yorkshire. It appeared by the affidavits, that at a vestry-meeting holden on the 13th of October the surveyors attended, and were ordered by the vestry to go before a certain magistrate on the following day. One of the surveyors accordingly attended with his accounts, but had omitted to take the assessments, and thereupon one *W. Cooke*, a rated inhabitant of the township, objected that the magistrate could not proceed to investigate the accounts. The magistrate being of opinion that it would be impracticable to investigate the accounts without having the assessments before him, desired the surveyor to attend with all the necessary documents at the petty sessions, holden at *Whitby* on the next day, the 15th of October. Both the surveyors attended there, and the accounts were examined and allowed by the justices, *W. Cooke* objecting that for want of an examination by the single justice the day before, the petty sessions had no jurisdiction.

Brodrick

Brodrick shewed cause. The objection to the proceedings in this case is merely one of form, the affidavits do not contain any suggestion that improper accounts have been allowed. The rule was granted upon the authority of *Rex v. Justices of Somersetshire* (*a*), where it was held that the justices at petty sessions had no power to allow accounts which had not been previously exhibited before a single magistrate. It is difficult to find any reason why that was required by the highway act, 18 G. 3. c. 78. In *Rex v. The Justices of West Riding of Yorkshire* (*b*), *Buller* J. says, that the justices at the petty sessions have the same power over the surveyor's accounts that any one justice has. The exhibiting them before one justice must therefore be mere matter of form, and that was complied with in the present case, for the surveyor attended before a magistrate pursuant to the order of the vestry, and that magistrate postponed the investigation until the petty sessions.

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YORKSHIRE.

Campbell, contra, was stopped by the Court.

ABBOTT C. J. The statute certainly requires that the accounts shall be exhibited before one justice in such a manner as may enable him to exercise his judgment upon them. The surveyor of *Fylingdales* neglected to take the assessments with him when he went before the justice, it was therefore impossible to ascertain whether the accounts were or were not correct. I think that sufficient was not done to satisfy the words of the statute, and that the allowance by the petty sessions was therefore invalid.

Order of petty sessions quashed.

(*a*) 5 B. & C. 816.

(*b*) 5 T. R. 632.

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*Friday,
January 26th.*

GOLDSTEIN *against* Foss and Another.

A declaration for libel after certain introductory matter, which was immaterial because not properly connected with the libel, set out the following publication of *and concerning the plaintiff*: " Society of Guardians for the Protection of Trade against Swindlers and Sharers, &c. I (meaning defendant) am directed to inform you that A. B. (meaning plaintiff) and C. D. are reported to this society as improper to be proposed to be balloted for as members thereof" (meaning that the plaintiff was a swindler and sharper, and an improper person to be a member of the said society). Plea, the general issue. After verdict for the plaintiff: Held, in arrest of judgment, that the innuendo was not warranted by the libel, and that the words of the libel, unexplained by introductory matter, were not actionable

LIBEL. The declaration began by reciting that the plaintiff was of good name, &c., and had for many years carried on business as a merchant in partnership with one Castle, and had never, until the publication of the libel thereafter mentioned, been suspected of swindling or cheating, and then proceeded: " And whereas also, before, &c., divers persons had been associated together under the name and description of the Society of Guardians for the Protection of Trade against Swindlers and Sharers; and the defendant Foss, under colour and pretence of being the secretary of the said society, had from time to time published, and was accustomed to publish certain printed reports, for the purpose of denoting and signifying to the members of the said society the names of such persons as were deemed and considered swindlers and sharers, and improper persons to be proposed and ballotted for as members of the said society, to wit, at, &c. Yet the said defendants, well knowing the premises, but contriving, &c., on, &c., did compose, print, and publish, and cause and procure to be composed, printed, and published, of and concerning the said plaintiff, in a certain printed paper, a certain false, scandalous, malicious, and defamatory libel, containing, amongst other things, the false and scandalous, malicious and libellous matter following, of and concerning the said plaintiff in the way of his said trade and business; that is to say, " Correspondence; 1825,

Society

Society of Guardians for the Protection of Trade against Swindlers and Sharpers ; *Richard Clark*, Esq., chamberlain of *London*, president ; *George Bridges*, Esq., Alderman and M. P., vice-president ; Messrs. *W. Praed* and Co. bankers, treasurers ; I (meaning the said defendant *Foss*) am directed to inform you, that the persons under named, or using the firms of *Goldstein* (meaning the said plaintiff), *Castles* and Co., 51. *Mark Lane*, and *Benjamin Porter Baker*, *Hackney Road*, are reported to this society as improper to be proposed to be balloted for as members thereof (thereby then and there meaning that the said plaintiff was a swindler and sharper, and an improper person to be a member of the said society.)" The declaration contained three other counts, in which the introductory statement as to the nature of the society and proceedings of *Foss* was omitted. Plea, not guilty. At the trial before *Abbott* C. J., at the *Middlesex* sittings after *Hilary* term 1826, a verdict was found for the plaintiff. In *Easter* term following a rule nisi for arresting the judgment was granted, on the ground that the inducement in the first count was not connected with the statement of the libel, so as to authorize the insertion of an innuendo, enlarging the meaning of the words of the libel ; and that without the innuendo the words did not appear to be actionable ; and that the other counts were bad for want of a proper inducement.

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Scarlett, *F. Pollock*, *Brougham*, and *Chitty*, shewed cause. The first count of the declaration does contain introductory matter sufficient to warrant the innuendo. It begins by reciting the existence of the society for the Protection of Trade, and then states the mode of proceeding on the part of the Secretary, *Foss*. That is

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equivalent to a colloquium. [*Abbott* C. J. How is the subsequent part of that count connected with that which you call the colloquium?] The society mentioned in the libel appears to be the same as that whose nature and proceedings are before mentioned. In *Tuchin's* case (a) it was alleged, that certain things were written "of and concerning the royal navy of this kingdom and the government of the said navy;" the libel was "the mismanagements of the navy have been a greater tax, &c.;" and to the word *navy* was added an innuendo, (meaning the royal navy of this kingdom,) not saying "the *aforesaid* royal navy;" and that was held sufficient to connect the libel with the introductory matter. But supposing them not to be connected, then, as the words of the libel are ambiguous, they may be explained by an innuendo; and the jury have found the truth of that introduced into this declaration, *Coles v. Haveland*. (b) If, however, it be held, that the innuendo cannot properly explain the meaning of the libel, it may be rejected as surplusage, *Roberts v. Camden* (c); and the words themselves being spoken of the plaintiff in the way of his business are actionable, and sufficient to sustain the verdict. It is now established, that words are not to be understood in *mitiori sensu*, but in the plain and popular sense in which the rest of the world naturally understand them, *Woolnoth v. Meadows*. (d) Now it is impossible to say that this publication, purporting to be a report that the plaintiff was an improper person to be proposed as a member of a Society established for the Protection of Trade against Swindlers,

(a) 14 *S. Tr.* 1095.(b) *Cro. Eliz.* 250.(c) 9 *East*, 93.(d) 5 *East*, 465.

might

might not very fairly be construed as an imputation upon his honesty ; and if so, the verdict of the jury has fixed that to be its meaning. Words spoken ironically, explained by innuendo without a colloquium, have been held actionable.

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Gurney, Bolland, and Campbell, contra. The innuendo introduced into this declaration cannot be supported. It extends the meaning of the alleged libel, which it cannot properly do unless connected with some preceding matter, *Hawkes v. Hawkey*. (a) The report of the case of *Coles v. Haveland* does not state the declaration ; probably it contained something to warrant the innuendo. [Abbott C. J. The expression at the end of the report, that the words used were a phrase of the country, leads one to suppose that there was some previous allegation of that nature.] The innuendo then being out of the question, the words are not actionable ; the only word in the alleged libel which can be relied upon, is *improper*, but that is one of the most comprehensive words in the *English* language. Its meaning is perfectly indefinite, and a jury could not be warranted in saying that the party using it meant to impute dishonesty to the plaintiff. But supposing the words to be actionable ; as the plaintiff has chosen by his innuendo to give them a certain precise meaning, if they will not bear that construction, the declaration is bad. The meaning of the words might be actionable, and yet not such as to entitle the plaintiff to so large damages as if the meaning were that which the innuendo attributes to them. (b) In *Roberts v. Camden* an innuendo was certainly re-

(a) 3 East, 427.

(b) See *Smith v. Carey*, 3 Camp. 461.

jected,

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jected, but that was a different case; the innuendo was perfectly immaterial.

ABBOTT C. J. The first question for our consideration is, whether the libel and innuendo are upon this record connected with the introductory matter, stating the object of the society and their mode of proceeding. If they are so connected, there can be no doubt that the action is maintainable; but I am of opinion that they are not so connected. The introduction stands by itself, and without reference to any other part of the declaration. After the introduction, the pleader has passed on to the intention of the defendants, and then to the printing and publishing the libel of and concerning the plaintiff. The libel itself is then set out; and at the close of it this innuendo is introduced, "thereby then and there meaning that the said plaintiff was a swindler and sharper, and an improper person to be a member of the *said society*." Now the introduction and the libel each mention a society, and it is impossible to consider the words *said society* in the innuendo to mean the society spoken of in the introduction, two having been before mentioned. Then it is to be considered whether the publication is in itself actionable. It is in these words: "Society of Guardians for the Protection of Trade against Swindlers and Sharpers, *R. C.* president, *G. B.* vice-president, *W. P.* and Co. treasurers. I am directed to inform you, that the persons under named, using the firms of *Goldstein, Castles, and Co.* 51. *Mark Lane*, and *Benjamin Porter, baker, Hackney Road*, are reported to this society as improper to be proposed to be balloted for as members thereof." The pleader has thought fit to introduce an allegation that by the libel it was intended to impute to the

the plaintiff that he was a swindler, but I think that by no means follows. There may be many reasons why a man may be unfit to become a member of such a society, although he is not a swindler; so much of the innuendo therefore is not warranted by the libel. Then is the import of the libel itself such as can be made the subject of an action? There may be fixed arbitrary rules which prevent the election of certain persons as members of the society, persons of a certain age or certain trades may be excluded; and there may be so many reasons why a person may be deemed unfit to become a member of the society, without casting any injurious reflection upon him, that I think we cannot possibly say with any degree of certainty that such was the intention with which this alleged libel was published. Upon these grounds, I think that the rule for arresting the judgment must be made absolute.

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BAYLEY J. I am of the same opinion. If the libel, as stated, had been connected with the introductory matter, the declaration might have been good; for then there might have been sufficient to warrant the introduction of the innuendo, according to the doctrine of Lord Mansfield in *Peake v. Oldham.* (a) But there is nothing in these counts to connect the libel with the introductory matter. The words *said society* in the innuendo refer to the society mentioned in the alleged libel, not to that which is described in the introductory part. Now the office of an innuendo is to explain, not to extend what has gone before; but the alleged libel by itself, and without reference to the introductory matter, does not warrant the innuendo, which in this case, therefore, seeks to extend, and not to explain the natural meaning of

(a) 1 Coup. 275.

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the words of the libel. That such an innuendo is bad is clearly shown by the case of *Hawkes v. Hawkey*, which is strictly applicable to the present question.

LITTLEDALE J. (a) I likewise think that judgment must be arrested. If the libel had been connected with the preceding matter the declaration would have sufficed. There is an introduction stating the object of a certain society, but there is no connection shown between that and the society mentioned in the alleged libel, which must, therefore, speak for itself. Taking the words of the libel by themselves, I think they are not actionable.

Rule absolute.

(a) Holroyd J. was absent on account of indisposition.

Friday,
January 26th.

STRONG and Others *against* HART and Others.

Where the master and part-owner of a vessel, who carried a cargo from St. John's, Newfoundland, to Bilboa, and delivered it there to the consignees, (he having signed bills of lading making the cargo deliverable to the consignors or their assigns, he or they paying freight for the same,) and

took a bill for the freight, which was afterwards dishonoured, and an action commenced against the consignors for the freight: Held, that the jury were properly directed to find for the defendants, if they thought that the captain took the bill voluntarily and for his own convenience, and that the defendants were not bound to prove that an offer was made to pay in cash.

to

to attend to the orders of *Page* and *Noble*, and agreed to pay an increased freight if the vessel should be ordered to a second port for delivery. Upon the arrival of the *Atlantic* with the fish on board at Oporto, *Page* and *Noble* directed the captain to proceed to Bilboa, and there place the cargo under the care of *Acha Basozabel* and Co. Captain *Allen* accordingly proceeded to Bilboa, delivered his cargo to *Acha Basozabel* and Co., and received from them a bill of exchange for the amount of freight due, drawn by them upon their correspondent in London, *Domingo de Ugarte*. No direct evidence was given to show either that Captain *Allen* demanded payment in cash, and took the bill because he could not obtain cash, or that he preferred taking the bill as more convenient, but he remitted it to his co-owners in England, and after delivering his cargo at Bilboa, returned with his ship to St. John's, in hopes of procuring another cargo. Before the bill became due, *Acha Basozabel* and Co. failed; and a few days after that was known, one of the plaintiffs, in a letter written to the defendants partly about other matters, mentioned the circumstance as follows: "You have no doubt been informed that *Acha Basozabel* and Co. of Bilboa have suspended their payments. I hold a bill of their drawing, on *Domingo de Ugarte*, and accepted by him; will you have the goodness to say your opinion as to his respectability?" The defendants, in answer, said, "We have heard of *Acha* and Co.'s failure, and we fancy their agent here, Mr. *Ugarte*, will be materially affected by their stoppage, but we hope he may be good for your bill, if not a large one." The bill was dishonoured when at maturity, whereupon this action was commenced. For the defendants, it was contended, that the bill

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bill taken by the captain, under the circumstances above stated, operated as a payment of the freight; that as the bill of lading made the goods deliverable to the consignees or their assigns, *they paying freight for the same*, the captain was bound to retain the goods until he obtained payment; and that the plaintiffs were at all events bound to give the defendants notice of the dishonour of the bill, which was not done, and that, consequently, they were discharged from the demand. For the plaintiffs it was answered, that the defendants could not set up the bill as payment, without proving that *Acha Basozabel* and Co. offered to pay in cash, and that *Allen* preferred taking the bill; that he was not bound to retain the cargo until the freight was paid; and that as the defendants were not parties to the bill, and could have no remedy over upon it, the plaintiffs were not bound to give notice of the dishonour; and that, at all events, the letter written before the bill became due, stating that *Acha Basozabel* and Co. had failed, was sufficient notice. The Lord Chief Justice was of opinion, that Captain *Allen* was not bound to retain the cargo until he obtained payment of the freight; and that the plaintiffs were not bound to give the defendants notice of the dishonour of the bill; but he directed the jury to find for the defendants, if they thought *Allen* took the bill voluntarily and for his own convenience, without insisting upon payment in cash; but to find for the plaintiffs if they thought that *Allen* took the bill, because he could not obtain payment in cash. A verdict having been found for the defendants,

The *Solicitor-General* now moved for a rule nisi for a new trial, on the ground of a misdirection by the Lord Chief

Chief Justice. He contended that the captain did not discharge the consignors by taking the bill in payment of the freight, unless it were shewn that he had the option of receiving the amount in cash, and preferred taking the bill, according to *Marsh v. Pedder*. (a) That the onus of proving that cash was offered lay on the defendants, and that they did not give any evidence upon, that point.

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ABBOTT C. J. I think that this case differs from that, of *Marsh v. Pedder*. Here was no charter-party under-seal binding the charterers to the payment of freight, and the goods were, by the bill of lading, made deliverable to *Adams and Noble*, or their assigns, *he or they paying freight*. But there are other circumstances still more peculiar. Before the bill became due one of the plaintiffs, writing to the defendants, mentions the failure of *Acha Basozabel* and Co., states that he holds a bill drawn by them on *Ugarte*, and asks whether the defendants think it will be paid. The answer is, that *Ugarte* will probably be greatly affected by the failure of the *Spanish* house, but that if the bill is not large it may probably be paid. This correspondence shews that the plaintiffs did not at that time consider the defendants liable to pay the freight if the bill should be dishonoured. Again, *Allen* the captain of the *Atlantic* wrote from *Bilboa*, stating his intention to make another voyage to *St. John's* instead of returning to *England*, and in the mean time remitted the bill to his partners, the plaintiffs; this, I think, shewed clearly that it was for his convenience to take the bill in payment, and the jury were

(a) 4 Camp. 257.

warranted

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warranted in finding that he voluntarily elected to do so.

BAYLEY J. I think that the evidence in this case took it out of the general rule laid down in *Marsh v. Pedder*. If the master of a vessel is to get payment in the best mode that he can, and has no power to get any thing but a bill, he must take that ; but if he can get paid in any better mode he should do so, otherwise he will be bound by taking a bill. The correspondence in this case fully justified the Lord Chief Justice in leaving it to the jury to say whether the captain took the bill voluntarily and for his own convenience. The onus of proving that he could not obtain payment in any other mode lay on the plaintiffs.

LITTLEDALE J. concurred.

Rule refused.

ROLPH against PECKHAM.

Where the Christian name of the defendant is omitted in the latitat, the Court will (if the process be bailable) set aside the proceedings on motion ; but if it be serviceable only, they will not interfere on motion, but leave the defendant to plead in abatement.

COMYN moved to set aside the bill of *Middlesex* issued in this cause, and all proceedings had thereon, for irregularity, the Christian names of the defendant not being inserted in the latitat, but his initials only, *J. W. Peckham*. He admitted that this was a case of serviceable process ; but he contended that there was no distinction in this respect between bailable and serviceable process, and he cited *Tomlin v. Preston and Gill.* (a)

(a) 1 Chit. Rep. 397.

Per

Per Curiam. Where the Christian name of the defendant is omitted in a bailable latitat, the Court will, on motion, set it aside for irregularity, but where it is omitted in serviceable process, they will leave the party to his plea in abatement.

Rule refused.

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FINLEY against GARDNER.

Monday,
January 29th.

DAVIS against GARDNER.

COLE against GARDNER.

A RULE nisi had been obtained for cancelling the deeds of covenant for payment of several annuities in these cases, and setting aside the judgments entered up on the warrants of attorney given to secure those annuities.

It appeared by the affidavits in support of the rule, that in *February* 1818 the defendant applied to *G. B. White* to raise him the sum of 3000*l.* by way of annuity ; that *White* applied to one *Dufour*, who was a negotiator in money transactions ; that the latter introduced *White* to one *Thomas*, as a person having a controul over the necessary funds for making the advances required. *Thomas* stated that he could procure the sum required for an annuity of 430*l.* per annum, that his customary

The same person being agent for the grantor of an annuity for the purpose of procuring the money, and also for the grantee for the purpose of paying over the consideration money to the grantor, at the time of executing the deeds for securing the annuity, paid over to the grantor the whole consideration money, but in pursuance of a previous agreement between the agent and

the grantor, part of the consideration money, amounting to 15*l.* per cent. upon the whole money, was returned by the latter to the agent for law expenses and for brokerage ; it was held, that this was a return of part of the consideration money to the party advancing the same, within the meaning of the 53 G. 3. c. 141. s. 6., and the annuities were set aside upon the grantor's paying the principal and interest, together with reasonable costs and brokerage.

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charge was 10*l.* per cent. for law expences, and 5*l.* per cent. would be required for the agency of *Dufour*; but that as the defendant's allowance from his father (which was his only income) was stated to be but 200*l.* per annum, he, *Thomas*, should require the payment of the first year's annuity to be made, and he therefore made it part of the condition on which the sum of 3000*l.* was to be advanced, that the sum of 430*l.* should be deposited in one of the *Cambridge* banks in the name of *White*, who was to draw it out by quarterly instalments, and remit it to *Thomas*. *White* stated these terms to *Gardner*, and he assented to them. Deeds were executed by *Gardner* on the 7th *March* 1818 for securing, during his life, the following annuities, viz. an annuity of 55*l.* to *J. Davis*, the consideration for which was 375*l.*; an annuity of 50*l.* to *J. Coles*, the consideration for which was 350*l.*; an annuity of 75*l.* to *Catherine Finley*, the consideration for which was 525*l.*; an annuity of 150*l.* to *S. Hicks*, the consideration for which was 1050*l.*; and an annuity of 100*l.* to *G. Millerett*, the consideration for which was 700*l.* Besides these deeds, warrants of attorney to confess judgments for securing these several annuities were given to the grantees. Upon the execution of these deeds and securities, *Thomas* paid to *Gardner* the full sum of 3000*l.* in bank notes, and immediately afterwards 300*l.* was returned to *Thomas* (in pursuance of the before-mentioned agreement) for his charge of 10*l.* per cent. for law expences in preparing the deeds and securities, and the further sum of 150*l.* was returned to *Dufour* for his agency charge of 5*l.* per cent.; and at the same time 430*l.* was deposited with *White*, for the purpose of securing the first year's annuity; and he paid it into a banker's at *Cambridge*, and drew out the same from time to time, as it was

required to pay the annuity. The affidavits further stated, that the defendant was unable to apply earlier to the Court to set aside the annuities, in consequence of his inability to provide sufficient funds for the payment of the money advanced to him, with the interest thereon, until the death of his father, which occurred only two months before. The affidavits in answer to the rule in the first two cases, stated that the grantees of the annuities did not make nor were privy to any contract for a return of any part of the consideration paid to the grantor, nor did they know that any part of the consideration-money had been returned to *Thomas*. In the case of *Cole v. Gardner*, the affidavit stated that the grantee of the annuity was dead, and that the party now entitled to it was a purchaser for a valuable consideration.

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Curwood, Comyn, and Barstow showed cause. More than six years having elapsed since these several annuities were granted, the Court ought not to set them aside upon any objection not appearing on the face of the memorial, *Ex parte Maxwell* (a); and this applies more strongly to the case of *Cole v. Gardner*, for in that case the original grantee is dead, and the party who now resists is a purchaser for a valuable consideration. Then as to the objections to the annuities, no part of the consideration-money was ever returned to the grantees, and they had no knowledge that any part was returned to *Thomas*. The latter was employed by the grantor to raise the money, and was his agent for that purpose. But, assuming that he may be considered the agent of the

(a) 2 East, 85.

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grantees for the purpose of paying over the consideration-money, he had no authority from them to retain or receive back any part of the same. In so doing he acted beyond the scope of his authority, and they, consequently, are not bound by his acts.

Storks contra. Part of the consideration money was returned to the party advancing the same, within the meaning of the 53 G. 3. c. 141. s. 6. In *Williamson v. Goold* (*a*) the agent of the grantee of an annuity, on paying the consideration money, returned, or caused to be returned to him, a considerable sum for the expence of the deeds, investigating title, journeys, &c. The Court of Common Pleas held it to be an illegal return of part of the consideration-money within the meaning of the statute, and set aside the annuity on the defendant's paying what might be found to be due for principal and interest; and in *Gorion v. Champneys* (*b*), the same person having been employed by the grantor of an annuity to raise money, and by the grantee to pay the consideration money to the grantor; at the time of the payment of the money received back some part of it for a debt alleged to be due from the grantor to himself; the Court of Common Pleas set aside the annuity on payment of principal and interest at 5*l.* per cent., although the grantee never received any of the money so returned, and was ignorant of that part of the transaction.

ABBOTT C. J. Upon the authority of the cases which have been decided, we are of opinion, that a part of the consideration money has been returned to the party advancing the same, within the meaning of the sixth sec-

(*a*) 1 *Bing.* 234.

(*b*) 1 *Bing.* 287.

tion

tion of the act of parliament, and that the rule for setting aside the annuity should be made absolute upon the defendant's paying the principal and 5*l.* per cent. interest, together with such costs and brokerage as the master shall think reasonable, as well as the costs of this application.

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Rule absolute.

BLOXAM and Another, Assignees of FOURDRINIER *Saturday,*
and Another, against ELSEE. *February 3d.*

THIS was a special action on the case against the defendant for infringing a patent. Plea, not guilty. At the trial before Abbott C. J. at the London sittings after Michaelmas term, 1825, the following appeared to be the facts of the case: By letters patent of the 20th of April 1801, reciting, amongst other things, that one Gamble had, by his petition, represented to the king, that he was in possession of a machine for making paper in single sheets without seam or joining, *from one to twelve feet and upwards wide*, and from one to forty-five feet and upwards in length, the method of making which machine had been communicated to him by a certain foreigner with whom he was connected,

By an act for enlarging the term granted to a patentee for the enjoyment of his patent, it was enacted, that in case the power, privilege, or authority, granted by the letters patent, should at any time become vested in, or in trust for more than the number of five persons, or their representatives, at any one time, otherwise than by devise or succession (reckon-

ing executors and administrators as and for the single persons they represent as to such interest as they are or shall be entitled to in right of such their testators or testator), then and in every of the said cases all liberties, privileges, and advantages vested in the patentees, their executors, administrators, or assigns, should cease, determine, and become void. The patentees having become bankrupt, and creditors exceeding five in number having proved under the commission, it was held, that this clause applied only to an assignment by act of the party, and not to an assignment by operation of law, and, consequently, that the interest of the assignees of the bankrupt in the patent had not ceased.

The patent was for a machine for making paper in single sheets without seam or joining from one to twelve feet and upwards wide, and from one to forty-five feet and upwards in length: Held, that this imported that paper varying in width between those extremes should be made by the same machine, and that the patentee at the time of taking out the patent, not having any machine capable of producing paper of different widths, the patent was void.

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and that he conceived the same would be of great public utility, and that the same was new in this kingdom, and had not been practised therein by any other person whomsoever to the best of his knowledge or belief—his late majesty granted to *Gamble*, his executors, administrators, and assigns, the sole privilege “of making, using, exercising, and vending the said invention for fourteen years.” By other letters patent of the 7th of *June* 1807, reciting, amongst other things, that *Gamble* had, by his petition, represented to the king, that he, in consequence of a further communication made to him by a certain foreigner residing abroad with whom he was connected, was in the possession of certain improvements on, and additions to, a machine for making paper in single sheets without seam or joinings *from one to twelve feet and upwards wide*, and from one to forty-five feet and upwards in length, being the machine for which he had obtained the letters patent, bearing date the 20th of *April* 1801; that such improvements and additions would not only make the said machine more perfect and complete, but by far more useful to the public than it was in its then present state; that the same so improved was new in this kingdom, and had not, with such additions and improvements, been practised therein by any person to the best of his (*Gamble's*) knowledge or belief—his late majesty did, by the last mentioned letters patent, grant to *Gamble*, his executors, administrators, and assigns, the sole privilege of making, using, exercising, and vending his said invention for the term of fourteen years from the date of the last mentioned letters patent. On the 7th of *January* 1804 *Gamble* assigned all his interest in these two patents to *H. Fourdrinier*

drinier and S. Fourdrinier, the bankrupts. By an act of parliament passed in 1807, reciting that *H. Fourdrinier* and *S. Fourdrinier* and *Gamble* had made, used, and continued to make use of the said improved machine in a very extensive trade, in part whereof *H. Fourdrinier* and *S. Fourdrinier* and *Gamble* were jointly concerned as copartners, and that they had been put to great expence, &c., it was enacted, that the sole privilege, right, and authority of making, using, and vending the said improved machine within the United Kingdom of *Great Britain* and *Ireland*, and in his late majesty's colonies and plantations abroad, should, from and after the passing of that act, be, and the same was thereby declared to be vested in *H. Fourdrinier*, *S. Fourdrinier*, and *Gamble*, their executors, administrators, and assigns for and during the term of fifteen years from thenceforth next ensuing, being an addition of seven years or thereabouts to the term granted by the said letters patent. By the sixth section, it was enacted, that every objection which might have been made to the validity of the said letters patent, and to the sufficiency of the specifications enrolled as aforesaid, should be of the like force and effect in law in any action or suit brought by virtue of that act as such objections respectively would have been if that act had not been passed, and if also the specifications to be enrolled, as required by that act, had been enrolled, instead of the former specifications respectively, except only as to the extension of the said privileges for the further term of years thereby granted.

By the seventh section of the act it was provided, that if *H. Fourdrinier*, *S. Fourdrinier*, and *J. Gamble*, their executors, &c. or any person or persons who should at any time during the said term of fifteen years

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have or claim any right, title, or interest in law or equity in or to the power, privilege, or authority of the sole making, using, and vending the said improved machine, should make any transfer or assignment, or pretended transfer or assignment of the said liberty or privilege thereby vested in *H. Fourdrinier, S. Fourdrinier, and J. Gamble*, their executors, &c. or any share or shares of the benefit or profits thereof, or should declare any trusts thereof to or for any number of persons *exceeding the number of five*, or should divide the benefit of the liberty or privileges thereby vested in *H. F., S. F., and J. G.*, their executors, administrators, and assigns, into any number of shares exceeding the number of five, or should do or procure to be done any act whatsoever during such time as such person or persons should have any right or title either in law or equity which should be contrary to the true intent and meaning of an act of the 6 G. 1. c. 18. s. 18.; or in case the said power, privilege, or authority should at any time become vested in or in trust for more than the number of five persons or their representatives at any one time otherwise than by devise or succession, (reckoning executors and administrators as and for the single persons they represent as to such interest as they are or shall be entitled to in right of such their testators or testator), then and in every of the said cases all liberties and advantages whatsoever thereby vested in *H. F., S. F., and Gamble*, their executors, administrators, and assigns, should utterly cease, determine, and become void, any thing therein contained to the contrary thereof notwithstanding.

On the 8th of Nov. 1810 a commission issued, under which the *Fourdriniers* were declared bankrupts, and the plaintiffs were duly chosen assignees, and more than

twenty

twenty creditors having proved under the commission, it was objected that the property in the patent having become vested in the assignees of the bankrupt in trust for more than five creditors, the interest of the patentees by the seventh section of the act of parliament had ceased and determined. The Lord Chief Justice was of opinion that an assignment under a commission of bankrupt was not within the meaning of the act of parliament, and he overruled the objection. It appeared by the specification of the patent taken out in 1801, that the machine then invented was so constructed as to be capable of producing paper of one definite width only, and in order to vary the width a new machine was required. By the subsequent improvements, however, one and the same machine became capable of producing paper of various widths. It was objected, that, as the person who petitioned for the first patent had represented to the crown that he was in possession of one machine capable of making paper of different widths, which was not true, the first and subsequent patents founded upon it were void. The Lord Chief Justice reserved the point.

Several other objections were made to the patent and specifications, which it is unnecessary to mention, as the Court did not pronounce any judgment upon them. One question upon which there was contradictory evidence was ultimately left to the jury, viz. whether the machine for which the first patent was granted was capable of producing useful paper. The Lord Chief Justice directed the jury to find for the plaintiffs if they were of opinion that it was, otherwise for the defendant. A verdict having been found for the plaintiffs, *Scarlett*, in *Hilary* term, 1825, moved for a new trial upon the several points made at the trial. As to those points upon which

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the Court pronounced their opinion, he contended, that, as the first patent was for a machine for making paper in single sheets without seam or joining, from one to twelve feet and upwards wide, and from one to forty-five feet in length, that imported a machine which, at the pleasure of the possessor of it, would make paper from one to twelve feet wide, and if that were so, then the question which ought to have been left to the jury was, whether the same identical machine for which the first patent was taken out was capable of making paper of different widths. Upon the evidence it clearly was not. Assuming, that by additions, regulations, and adjustments not suggested in the specification of the first patent, a machine upon the same principle as that described in the specification might be constructed capable of making paper of different widths, still it was perfectly clear that the identical machine therein described was not capable of making paper of different widths. Now a patent for a machine is void, if the machine will not answer the purpose for which it is intended without some addition, adjustment, or alteration, which the mechanic who makes it must introduce of his own invention in order to make it work, *Rex v. Arkwright.* (a) But this patent is void upon another ground, for the interest in the patent became vested in the assignees of the bankrupt in trust for more than five persons. [*Bayley J.* Are not the assignees of a bankrupt his representatives?] They are the representatives of the creditors, and not of the bankrupt. The word representatives means executors or administrators. The words "otherwise than by devise or succession," if they have any

(a) Cited in 8 *Taunt.* 399. *Davies's Patent Cases,* 129.

meaning,

meaning, must import that every species of devolution, except by devise or succession, whereby the privileges granted to the patentee shall become vested in trust for more than five persons, shall be void. That is the true meaning of the clause in the act of parliament, unless some other word be introduced into it. In *Hesse v. Stevenson* (a), the patentees' interest might, by the terms of the letters patent, be assigned to any number of persons not exceeding sixty. A bankruptcy occurred. It was objected that the interest of the patentees would not pass to the assignees under the commission ; but it was held, that whatever the bankrupt could assign, the assignees would take, and as the creditors did not exceed sixty, the assignees might take the interest in the patent. The ground of the decision was, that the number of creditors did not exceed that mentioned in the act of parliament. Here the creditors do exceed the number specified in the act.

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ABBOTT C. J. Looking at the act of parliament and looking at the usual clause in letters patent, and finding that in each of them there is a reference to the statute 6 G. 1. c. 18., and construing the whole clause either in the letters patent or in the act of parliament, with reference to that which appears to my mind to be plainly and manifestly its object, it is my opinion that the whole clause is confined to assignments by acts of the party, and does not apply to any assignment or transfer by operation of law, and, consequently, that it will not apply to an assignment under a commission of bankrupt. Under the ship register acts there are peculiar clauses

(a) 3 Bos. & Pul. 565.

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requiring every assignment to be notified in a particular manner, as clear and minute as words can be without any exception of bankruptcy, or any thing of that kind, and yet it has been held, that the assignees of a bankrupt take the interest in a ship, though there is no registration of the conveyance. Upon that point I think there should be no rule, but some of the other points are well deserving of consideration, and as to them the defendant may take a rule. •

BAYLEY J. I have no doubt upon the construction of this clause. I disclaim all right in the Court to introduce or exclude words from this clause, but I think we are bound to construe the words which the clause contains, and that is all which I desire to do. The words in this clause are, "In case the power, privilege, or authority shall at any time become vested in, or in trust for more than the number of five persons or their representatives at any one time, otherwise than by devise or succession, (reckoning executors and administrators as and for the single persons they represent)" — There are not only the words "the number of five persons," but there are the words, "or their representatives;" and those words, "or their representatives," are entitled to have some meaning, and the words "otherwise than by devise or succession," will apply to the words "or their representatives," as well as "the number of five persons." Now the question in my mind is, what does the act mean by "their representatives?" If the assignees of a bankrupt are the representatives of a bankrupt, this patent is not vested in them, otherwise than this act of parliament says it may be vested; it was vested in the *Fourdriniers*, the bankrupts, if they did not

exceed the number of five : the bankruptcy, by a statutable transfer, has made the assignees of the bankrupt the representatives of the bankrupt, and that is the construction which, in my opinion, these words are entitled to receive.

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HOLROYD J. I think that, in this case, the assignees of the bankrupt are to be considered as the representatives of the bankrupt, and that they had his property as his representatives, and not as the representatives of the creditors. It is true, they take the property for the purpose of selling and disposing of it ; and it is true, that the proceeds from the sale they may hold in trust for the creditors, but they are the representatives of the bankrupt in relation to this property. They hold it subject to the power of converting it into money, and then that, money they will hold in trust. It appears to me that, under the act of parliament, it is not void, though the creditors may amount to more than five.

LITTLEDALE J. It seems to me that the words of the act of parliament do not apply to a transfer by operation of law. The assignees represent the bankrupt by operation of law. It does not appear to me, therefore, that a transfer of the property to the hands of the assignees is at all within the meaning of this clause.

The *Solicitor-General, Marryat, Gurney, and Cutwood*, showed cause, and contended as to the only other point which this court ultimately decided, that the recital in the patent did not import that paper of different widths was to be made by one and the same machine, but that any width between one and twelve feet might be obtained by different machines, each adapted and constructed to

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the width required ; that the patent was merely for an invention of such a character, that a machine might be constructed capable of making paper of any width between one and twelve feet.

ABBOTT C.J. I think one of the objections which has been taken in this case is valid, and must prevail ; and consequently it is not necessary to give any opinion upon the others. By the patent it appears that the patentee had represented to the crown that he was in possession of *a* machine for making paper in single sheets, without seam or joining, from one to twelve feet ~~and upwards wide~~, and from one to forty-five feet ~~and upwards in length~~. Upon this representation the patent is granted. The consideration of the grant is the invention of a machine for making paper in sheets of width and length varying within the limits designated. If any material part of the representation was not true, the consideration has failed in part, and the grant is consequently void, and a defendant in an action for infringing the patent has a right to say that it is so. Now I think it impossible to say that both width and length are not important parts of this representation. It may be that if the representation had mentioned length only, a patent would have been granted for the invention, which (in its improved state at least) is eminently useful, in a very important manufacture, as saving both time and labour in a very considerable degree. But although I may think this probable, I am not at liberty to pronounce judicially that it would have been so. I must therefore see whether the representation was true. It has been contended in support of the patent that the recital does not import that paper of different widths was to be

made by one and the same machine, but may mean only that the width might be obtained by different machines, each adapted and constructed to the extent required. But I think this construction of the recital cannot be allowed; for it is a different thing whether a manufacturer must supply himself with several different machines or with one only capable alone of accomplishing all the purposes to be obtained by many. And if the width is not to be considered as material, the length cannot be so considered, and then the representation will only be that he has invented machines by the use of several of which paper of various widths and lengths may be made without seam or joining. And this will be at variance with all the specifications, which plainly show that whatever was done was to be done by one and the same machine. Then if the representation be (as I think it is) that paper of various widths may be obtained by one and the same machine, I must look to the evidence to discover whether the patentee was possessed of a machine, or of the invention of a machine, capable of accomplishing this object. And unfortunately the evidence shows that he was not. I say unfortunately because it is to be lamented that the advantage of great ingenuity, labour, anxiety, and expence should be lost to those who have bestowed them. The patentee was at the time possessed of one machine, and one only, and this adapted to one degree of width, and one degree only. And he was not then possessed of any method by which different degrees of width might be manufactured by that machine or by any other. I think it may be admitted that by subsequent improvements and discoveries a machine was obtained capable of making paper of width varying within certain limits, though probably

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probably not extending to more than half the width mentioned in the patent. The specification enrolled under the act of parliament appears sufficiently to describe such a machine, and a mode of adjusting it to different degrees of width within the limits of its own breadth. The first specification is evidently confined to one width only. Then can the last specification be taken to furnish an answer to the objection? Now supposing the act of parliament so far substitutes the last specification in the place and stead of the former specifications as to remove all formal objections to them to which the latter is not open, still it cannot so far operate retrospectively as to enable the patentee to say that he possessed in 1801, or had then discovered or invented a machine which it appears that he did not possess, and had not invented or discovered until a much later date. If the first machine had been capable of working at different degrees of width, though clumsily and imperfectly, the latter machine would have been an improvement of it; but as the first, whether considered as existing actually or in theory, was wholly incapable of this, the latter machine does not in this respect furnish an improvement of any thing previously existing, but an addition of some new matter not existing or known at the date of the first patent, and which nevertheless is therein represented as existing or known, and which cannot but be considered an important part of the representation then made, and of the consideration of the grant. If the first grant was void, the subsequent grants by the patent and by the statute must fall to the ground, as having nothing to support them. I think myself compelled therefore to yield to this objection. If however the law in this respect should not be in the

opinion

opinion of my learned Brothers, that which I own it has appeared to me to be, still there must be a new trial, because the question ought to have been left to the jury, whether the machine as originally constructed was capable of doing that which the patentee professed it should do, namely, make paper of different widths. I may say that I did not leave that question to the jury, because it appeared to me to be clear upon the evidence that the machine as originally constructed would not make paper of different widths. The rule for a new trial must therefore be made absolute.

Rule absolute for a new trial.

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The KING *against* The BRISTOL Dock Company. *Saturday,*
February 3d.

IN Michaelmas term a writ of mandamus issued, directed to the defendants, which, after reciting a part of the act of parliament 43 G. 3. c. 140. whereby the company were empowered to make a floating dock, &c., proceeded as follows: "And it was in and by the said act further enacted, that it should and might be lawful for the directors of the said company, at the charge of

By act of parliament empowering certain persons to make a floating harbour at Bristol, it was enacted, "that it should and might be lawful for the directors of the Bristol Dock Company, and they

were thereby authorised and required to make a common sewer in a certain direction therein specified, and also, to alter and reconstruct all or any of the sewers of the said city at the mouths thereof, so and in such manner that the sewers might be discharged considerably under the surface of the water in the floating harbour, and also to make such other alterations and amendments in the sewers of the said city as might or should be necessary in consequence of the floating of the said harbour." The directors altered several of the sewers, so as to discharge them considerably under the surface of the water in the floating harbour, but the sewage there discharged was so offensive as to be a nuisance to the neighbourhood: Held, that, under the latter part of the clause above set forth, the directors were authorised and required to make a new sewer, if necessary, to remove the nuisance.

A writ of mandamus commanded the directors "to make such alterations and amendments in the sewers as were necessary in consequence of the floating of the harbour:" Held, that this was in the proper form, and that it was neither requisite nor proper to call upon the Company to make any specific alteration, the mode of remedying the evil being left to their discretion by the act of parliament.

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the company, and they were thereby authorised and required to form and complete a common sewer from a certain place called *Castle Pill* through *Bread Street* and *Avon Street*, or the streets and lands adjoining, or near adjoining thereto, into the river *Avon*, above a certain dam directed by the said act to be made at *Temple Meads*, and also to form and complete collateral sewers leading thereto, and to alter the then present sewers of the said city of *Bristol*, so and in such manner that the greater part of the sewage then discharged into the river *Avon* above *Bristol Bridge* might be carried off, and not permitted to mix with the water in the floating harbour, and also to alter and reconstruct all or any of the sewers of the said city at the mouths thereof, so and in such manner that the sewers might be discharged considerably under the surface of the water in the said floating harbour; and also to make such other alterations and amendments in the sewers of the said city as might or should be necessary in consequence of the floating of the said harbour." And whereas we have been given to understand in our court before us, that by virtue and in pursuance of the said act and of certain other acts of parliament made and passed respectively for altering and amending the same, and extending the powers and provisions thereof, the said floating harbour in the said first mentioned act mentioned has been made. And whereas we have also been given to understand in our said court before us, that, in consequence of the floating of the said harbour as by the same act mentioned and directed, divers noxious and unwholesome smells and stenches have been for a long time last past and still are emitted and sent forth from the sewage discharged into the said floating harbour, and from the waters dammed up therein,

therein, and the air there hath thereby become and still is greatly corrupted and infected, and that divers alterations and amendments in the sewers of the said city of *Bristol* have become and still are necessary in consequence of the floating of the said harbour, and that application hath been made to you the said company by and on behalf of divers of our liege subjects inhabiting and dwelling within the said city, and near to the said floating harbour, to make such alterations and amendments in the sewers of the city as have so become and are necessary in consequence of the floating of the said harbour as aforesaid, but that you, the said company, well knowing the premises, but not regarding your duty in this behalf, have altogether neglected and refused, and still do neglect and refuse to make any such alterations and amendments as aforesaid, in contempt of us, and to the great discomfort, prejudice, and inconvenience of divers of our said subjects inhabiting and dwelling within the said city, and near to the said floating harbour as aforesaid. And whereas they have humbly besought us that a fit and speedy remedy may be provided in this respect, and we being willing that due and speedy justice should be done in the premises as it is reasonable, do command you, the said *Bristol Dock Company*, that you do without delay make and cause to be made all such alterations and amendments in the sewers of the said city as have become and are necessary in consequence of the floating of the said harbour, or that you shew us cause to the contrary thereof, &c.

In this term the following return was made: We, the *Bristol Dock Company*, most humbly certify to our lord the king, that after the passing of the said acts of parliament, and before the issuing of the said writ, we did in

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due manner form and complete the said common sewer from the said place called *Castle Pill*, through *Bread Street* and *Avon Street*, in the streets and lands adjoining, or near adjoining thereto, into the river *Avon* above the said dam, directed by the said first-mentioned act to be made at *Temple Meads*, and did form and complete collateral sewers leading thereto, and did then alter the then present sewers of the said city of *Bristol*, so and in such manner that the greater part of the sewage at the time of passing the said first mentioned act of parliament, discharged into the river *Avon* above *Bristol* bridge, might be, and was, and is carried off and not permitted to mix with the water in the floating harbour; and also did alter and reconstruct part of the sewers of the said city at the mouths thereof, as was requisite and necessary to be done in that behalf, so and in such manner that the sewers might be, and were and are discharged considerably under the surface of the water in the said floating harbour; and protesting that no other alteration or amendment in the sewers of the said city, according to the true intent and meaning of the said statute, hath become, or at the time of issuing the said writ was, or hath been since, or now is necessary in consequence of the floating of the said harbour; nevertheless we do further make answer and certify to our lord the king, that so long as the said sewers, so altered and reconstructed as aforesaid, shall continue to be discharged under the surface of the water in the said floating harbour according to the directions of the said statute, neither the nuisances in the writ of our lord the king mentioned, nor any other grievance arising in consequence of the floating of the said harbour can be removed, or in any manner remedied by any alteration or amend-

amendment whatsoever of the same sewers, or of any other sewers whatsoever of the said city. And we do further certify and inform our lord the king, that if the same nuisances or any other grievance arising in consequence of the floating of the said harbour can be removed or remedied by any other means of sewage, it can only be by forming and completing new sewers to be conducted to and discharged at some other and different place or places than under the surface of the water of the said floating harbour; and we do further certify and inform our lord the king that all the powers and authorities given to us by the said statute, or by any other of the statutes in this behalf made and provided, to enter upon any lands and tenements of others the subjects of our lord the king, for the purpose of constructing, forming, and completing any new sewer or sewers, long before the issuing of the said writ of our lord the king, had by virtue of the said statutes ceased and determined, and that we had not before the issuing of the said writ, nor have we now any lands nor any lawful power or authority to obtain and have any lands by, through, or under which any new sewer for the purpose aforesaid could or can be made, formed, and completed.

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Oldnall Russell took exceptions to the validity of the return, because it did not state any matters of fact explicitly and distinctly in answer to the writ, and neither admitted nor denied that the alterations and amendments in the sewers mentioned in the writ were necessary in consequence of the floating of the harbour. In *Bac. Abr. Mandamus* (I), it is laid down, that “the return to a mandamus must be certain to every respect; therefore it is said not to be sufficient to offer such mat-

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ter, as the party may falsify in an action, but also such matter must be alleged that the Court may be able to judge of it, and determine whether the party's conduct be agreeable to law or not." And in *Rex v. Lyme Regis* (a) Buller J. says, "I agree, that in these returns (to writs of mandamus) the same certainty is required as in indictments or returns to writs of habeas corpus." Now the return before the court begins with a protestation, and there is no instance in which such a form has hitherto been adopted. Perhaps it was intended for an admission that certain alterations are necessary, but it is not a direct admission, and, therefore, cannot suffice in a return. Assuming, however, that it amounts to a sufficient admission that certain alterations are necessary, the return proceeds to state, that *so long as* the sewers are discharged under the surface of the water in the floating harbour, the nuisances mentioned in the writ cannot be remedied by any alterations or amendments of the *same* sewers. Now that is merely a conditional allegation; and it is not in any manner averred that the sewers *must* be discharged under the surface of the floating harbour. Taking it, however, as an allegation that the sewers must be so discharged, and admitting the return, however informal, to be in substance a statement that the company have no power to make the alterations required, that return is bad, because not agreeable to the true construction of the 43 G. 3. c. 140. s. 37. That section, after authorizing and requiring the company to make certain alterations in the sewers of *Bristol*, proceeds, "and also to make such other alterations and amendments in the sewers of

(a) 1 Doug. 158.

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the said city as may or shall be necessary in consequence of the floating of the said harbour." Now the words "alterations and amendments" include the making of new sewers if necessary; for in *Rex v. Hall* (*a*) it is said by the Lord Chief Justice that "the meaning of particular words in acts of parliament, as well as other instruments, is to be found, not so much in a strict etymological propriety of language, nor even in popular use, as in the subject or occasion on which they are used, and the object that is intended to be attained." Now it is impossible to doubt, that the object to be attained in this case was the protection of the citizens of *Bristol* against any nuisance that might arise in consequence of the floating of the harbour. Nor can the allegation in the return, that the company have no power to purchase lands to make new sewers be deemed any answer to the writ, for it is not necessary that they should become the owners of the soil in order to make sewers; *Hollis v. Goldfinch* (*b*), *Earl of Portmore v. Bunn.* (*c*) At all events, as the defendants have brought this nuisance into the city of *Bristol*, they are bound to find a remedy, even although that should include an obligation to purchase lands.

Maule contra. First, the return is good; secondly, the writ itself is bad. The first objection made to the return was, that it neither admits nor denies that alterations are necessary. [Abbott C. J. I hope you do not mean to rely on the protestation; that clearly cannot help you.] A protestation in pleading is certainly of no avail, but that does not apply to returns to writs of

(*a*) 1 B. & C. 156. (*b*) 1 B. & C. 205. (*c*) 1 B. & C. 694.

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mandamus. The word *protesting* is not to be considered as used in the technical sense given to it in pleading, it may be considered as an earnest asseveration of a fact. But rejecting that, if the residue of the return be good, the former part, although bad in form, will not affect the question, for it is not inconsistent with that which follows; *Rex v. Mayor of Cambridge.* (a) Then the defendants go on to say, that the sewers must be discharged under the surface of the floating harbour; and, secondly, that the words “alterations and amendments” do not give power to make new sewers. Throughout the statute, where any new work is to be made, it is particularly specified; and in the very clause in question the thirty-seventh, the direction and termini of the new sewers thereby authorized to be made are particularly pointed out, and it cannot be supposed that the legislature intended, by the general words at the end of the section, to give the dock company power to make new sewers in any direction they pleased, to which length the argument on the other side must be carried. But even supposing the words to be open to that construction, the company have no power to purchase lands. [Abbott C. J. The return admits that the company once had a power to enter upon lands for the purpose of making new sewers; by what clause is that restrained?] The forty-third. [Abbott C. J. That applies only to the purchase of lands and to compulsory purchase. But in fact the whole question seems to turn upon the construction of the thirty-seventh section.] Then the writ itself is bad; it recites, that noxious smells, &c. arise from the damming up of the water, and then says, that certain alterations and amendments of the sewers have

(a) 2 T. R. 456.

become

become necessary in consequence of the making of the floating harbour; but does not state, that they have become necessary in consequence of the noxious smells. It is consistent with this language that the necessity for the alterations may have arisen from other causes. Then it alleges that the company were requested to make such alterations as were necessary by reason of the making of the floating harbour, not such as were rendered necessary by the noxious smells. It is not alleged that they were ever requested to make any specific alteration, nor does the writ refer to any thing which furnishes information as to what particular thing is necessary.

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ABBOTT C. J. I am of opinion that this return must be quashed, and a peremptory mandamus awarded. I will first dispose of the objections made to the writ, because if that is bad, the return becomes immaterial. The writ begins by reciting the act of parliament, under the authority of which the floating harbour was made; and then states that his majesty has been given to understand that the floating harbour has been made, and that in consequence of the floating of the said harbour divers noxious and unwholesome smells have been and still are emitted from the sewage discharged into the said floating harbour, and that the air there hath thereby become corrupted, and that divers alterations and amendments in the sewers of the city of *Bristol* have become necessary in consequence of the floating of the harbour; that the dock company have been requested to make such alterations and amendments as have so become necessary, but have neglected to do so; and then the writ commands them to make such alterations and amendments. Two objections have been made to this writ, first, that although it recites that noxious

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smells have arisen from the sewage, and that alterations are necessary, it does not state that they are necessary in consequence of the sewage being discharged into the floating harbour. There is not, it is true, any direct allegation of that, but it is stated in language which no person can misunderstand. The second objection was, that when the application was made to the company, no particular alterations or amendments were specified, and that the writ is equally general in its terms. I am of opinion that such specification was not either necessary or proper. The act of parliament gives the company power, and requires them to do what is necessary, but leaves the mode of doing it to their discretion, and other persons have no right to deprive them of the exercise of that discretion. The objections to the writ are, therefore, insufficient, and we now come to the return. It is certainly very informal, but in a question of so much importance, I had rather dispose of it upon substantial than upon formal grounds. The only substantial question depends upon the true construction of the 37th section of the act of parliament, for the latter part of the return, relating to the cesser of the powers given to the company, certainly is not warranted by the act. The 45d section applies only to the purchase of lands, and the return does not say that the thing required cannot be done without a purchase. Then what is the meaning of section 37. By this enactment, (passing by all that which relates to the sewage to be carried into the river *Avon*,) it is made lawful to the company, and they are authorized and required to alter and reconstruct all or any of the sewers of the city at the mouths thereof, so and in such manner that the sewers may be discharged considerably under the surface of the water in the floating harbour; and also

also to make such other *alterations and amendments* in the sewers as may or shall be necessary in consequence of the floating of the said harbour. It has been contended, that inasmuch as the company did alter the sewers so as to discharge them under the surface of the water in the floating harbour, they have done all that can be required of them. But that would render the latter part of the clause wholly inoperative, and it will also follow that the legislature must be supposed to have given the company power to stop the course of the rivers *Avon* and *Frome*, and to keep out the tide; and to have provided that if the air should be thereby rendered so corrupt as to prove unhealthy to all the neighbourhood, still the nuisance must be allowed to exist. To suppose that the legislature intended to give such a power, is to suppose that they intended something so outrageous and absurd, that we cannot for a moment imagine it to have been within their contemplation. It has been urged also, that the sewers are at all events to be discharged into the floating harbour. But the direction, that if they are taken into the floating harbour, the mouths shall be carried considerably under the surface of the water, is quite consistent with a power to carry them elsewhere if necessary. For these reasons I am of opinion that the writ is good, and that the return being insufficient must be quashed, and a peremptory mandamus awarded.

BAYLEY J. For the reasons which have been given, I concur in thinking the writ in this case good. Then as to the return, the only argument of any weight urged in favour of it was that the dock company were compelled to alter the sewers, so that they should be discharged into the floating harbour. But where several

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words importing power, authority, and obligation are found at the commencement of a clause containing several branches, it is not necessary that each of those words should be applied to each of the different branches of the clause; it may be construed reddendo singula singulis, the words giving power and authority may be applicable to some branches, those of obligation to others. Thus in the clause under consideration it is enacted, "that it shall and *may be lawful* for the said directors, and they are hereby *authorized and required* to form a new common sewer in a certain direction;" to that certainly the words of obligation apply, they are *required* to do it. The enactment proceeds: "And also to alter or re-construct *all or any* the sewers of the city at the mouths, so and in such manner that the sewers may be discharged under the surface of the floating harbour." It would be a curious *obligation* to alter *all or any* of the sewers. That manifestly is left to their discretion, they have *authority* to do it provided they so alter the construction of them that they may be discharged under the surface of the water. Then follows the most important part of the section: "And also to make such other alterations and amendments in the sewers of the said city as may or shall be necessary in consequence of the floating of the said harbour." Now it cannot be supposed that the legislature meant to leave it in the discretion of the dock company to do or leave undone such things as were necessary, or that they imposed the obligation without giving power to perform it. To this part of the clause therefore both the words of authority and those of obligation are applicable. But the alterations are to be made at the expence of the company, they must by their own funds obtain the means of doing that which is required of them.

HOLROYD

HOLROYD J. The return resolves itself entirely into the construction of the 37th section. I had some doubts during the argument, but they have been removed by the judgments that have been delivered. My doubt was, whether the company were not bound to discharge the whole of the sewage into the floating harbour. But I think that the power and authority given vest a discretion in the company as to which sewers shall be discharged into the harbour, and that the words of obligation as to discharging them under the surface of the water are satisfied by applying them to those sewers.

Return quashed, and peremptory mandamus awarded.

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THOMPSON and Another *against ATKINSON.*

THE defendant had been arrested in this cause for 179*l.* On the 7th of December the cause came on for trial, and it was ordered that the jury should find a verdict for the plaintiff for 500*l.* damages, subject to the award of an arbitrator, to whom the cause and all matters in difference between the parties were referred, and the costs of the cause were to abide *the event of the award*, and the costs of the reference were to be in the discretion of the arbitrator. The arbitrator made his award in the following terms: "I find that, at the time

The defendant was arrested for 179*l.* At the trial a verdict was found for the plaintiff, subject to the award of an arbitrator, to whom the cause and all matters in difference between the parties were referred, and the costs of the cause were to abide *the event of the award*.

The arbitrator by his award found, that at the commencement of the suit there was due from the defendant to the plaintiff the sum of 45*l.* 10*s.*, and that the plaintiff had no reasonable or probable cause for arresting the defendant for 179*l.*; and that the defendant by reason thereof was entitled to compensation or damages to the amount of 20*l.* The arbitrator then ordered the verdict to be finally entered for the plaintiff for 25*l.* 18*s.* the balance due to him after deducting therefrom the damages awarded to the defendant. The Court refused to allow the defendant costs under the statute 43 G. 3. c. 46., inasmuch as by the terms of the reference the costs were to abide the event of the award, and that was in favour of the plaintiff.

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of the commencement of the said action, there was and still is due and owing from the defendant to the plaintiffs upon a balance of accounts between them, the sum of 45*l.* 18*s.* And whereas it has, upon the said reference, been proved on the part of the defendant, that he, the defendant, was arrested in this action at the suit of the plaintiffs on the 20th day of *July* for the sum of 179*l.*, and that he continued in custody under such arrest for the space of five weeks; and whereas I find that the plaintiffs had no reasonable or probable cause for arresting the defendant for so large a sum as 179*l.*; I do award, order, adjudge, and declare, that the defendant by reason *thereof* is entitled to compensation or damages to the value and amount of 20*l.* And whereas no other matters were, upon the reference, alleged by either of the said parties to be in difference between them; I do order that the verdict in the said cause shall be vacated, annulled, and set aside, and instead thereof, that a verdict shall be entered for the plaintiffs for the sum of 25*l.* 18*s.*, the same being the amount of the balance which I find due to the plaintiffs after deducting therefrom the amount of the damages I have awarded as aforesaid to the said defendant." A rule nisi having been obtained for allowing the defendant his costs pursuant to the statute 43 G. 3. c. 46.,

Dennman now shewed cause. By the submission, the costs of the cause are to abide the event of the award. The legal effect of the plaintiffs having recovered a verdict is, that they are entitled to the costs of the cause. By the very terms of the submission, therefore, the plaintiffs are entitled to those costs. The arbitrator has found that the plaintiffs had no reasonable or probable cause

cause for arresting the defendant for 179*L.*, and he has awarded the defendant a compensation in damages for the injury which he has thereby sustained. It is discretionary in the Court to allow the costs, and they ought not to allow them in a case where the party has already been compensated for the injury sustained by him in consequence of the unlawful arrest.

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Gurney and *Comyn* contrà. It is clear that this is a case in which the Court would have allowed the defendant his costs, if the cause had not been referred, and after such costs had been allowed, he might have maintained an action for the unlawful arrest. The arbitrator has not awarded any thing to the defendant for costs, and he ought not to be deprived of those costs because the arbitrator has awarded damages for the unlawful arrest. The statute 43 G. 3. c. 46. s. 9. enacts, "that the defendant shall be entitled to costs if it appear to the Court that the plaintiff had not any reasonable or probable cause for causing the defendant to be held to bail for the sum for which he was arrested." Here that does appear, and therefore the Court ought to order the costs to be allowed to him.

ABBOTT C. J. Looking at the terms of the submission and of the award, I think that this rule ought not to be made absolute. By the submission, the plaintiff stipulated that the costs of the cause should abide the event of the award; and subject to that condition, they also agreed not only that the cause, but that all other matters in difference between them and the defendant should be referred to the arbitrator. One matter in difference between the parties at the time of the submission was,

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was, whether the defendant was or was not entitled to a compensation for the injury he had sustained in consequence of having been held to bail for 179*l.*, when a much less sum was due from him to the plaintiffs. That matter has been considered by the arbitrator, and he has awarded to the defendant 20*l.* as a compensation for the injury which he sustained by the unlawful arrest. I think that, as the plaintiffs must be taken to have consented to refer that matter to the arbitrator, on the condition that the costs of the cause should abide the event of the award, and, as in consequence of such consent, there has been awarded to the defendant a compensation for the injury he sustained by the unlawful arrest, we ought not, in the exercise of the discretion vested in us, to make an order that the defendant be allowed his costs. This rule must therefore be discharged.

Rule discharged.

Monday,
February 5th.

BRAZIER *against* JONES.

In an action against the marshal for an escape, the bill was entitled generally of Michaelmas term, and the escape was alleged to have taken place on the 15th of November.

There was a

special demurrer, for that the cause of action appeared to have accrued after the first day of the term to which the bill had relation. The Court allowed the plaintiff to amend on payment of costs, although it appeared by affidavit that the prisoner had returned into the custody of the marshal before any application for liberty to amend was made.

of

THIS was an action against the marshal for an escape. The bill was entitled generally of Michaelmas term, 1826. The escape was alleged to have taken place on the 15th of November 1826, and the bill was filed on that day. The defendant demurred specially, and assigned as a cause of demurrer, that the bill being entitled generally of the term, had relation to the first day

of the term; whereas the escape was alleged to have taken place and the cause of action to have accrued on the 15th day of *November*, a day subsequent to the first day of the term. The plaintiff, on the 23d *November*, took out a summons, returnable before the Lord Chief Justice, for leave to amend the bill; and he, thinking the matter more fit to be decided by the whole Court than by a single judge, did not make any order. The demurrer was filed on the 22d of *November*. The defendant took out a summons on the 21st of *November* for time to plead or demur. A rule nisi having been obtained for amending the declaration, on payment of costs, it appeared, by the affidavits in answer to the rule, that the prisoner had, on the 21st of *November*, returned into the custody of the marshal.

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Campbell now shewed cause. The bill already filed against the marshal is insufficient, for the cause assigned in the demurrer; and upon that demurrer the defendant is entitled to judgment, and the plaintiff will then be driven to file a new bill, to which the defendant may plead a recaption before the exhibiting of the bill. The effect of allowing the amendment will be to preclude the defendant from pleading the recaption, and will be equivalent to allowing the plaintiff to file a new bill *nunc pro tunc*.

Scarlett and *Comyn* contrà. The general rule is, that either party may amend, on payment of costs, while the proceedings are on paper and not entered of record; and an amendment of a declaration has been allowed in actions against privileged persons, and after error brought;

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Deacon v. Vivian (a), *Dickinson v. Plaisted* (b); or after the outlawry of some of the defendants, *Coutanche v. Le Ruez*, (c) It has been allowed in an action against an attorney, *Greenwood v. Richardson* (d); and in an action against bail, *Hodgson v. Michell*. (e) In *Smith v. Key* (f) the plaintiff was compelled by the Court, at the instance of the defendant, to entitle his declaration specially, to accord with the fact and actual time of filing; and the same thing was done in *Wilkes v. The Earl of Halifax*. (g) Even in an action against the warden of the Fleet, the plaintiff, at the suggestion of Gibbs C. J., was allowed to amend his declaration, *Barns v. Eyles*. (h) Then, as to the marshal being precluded from pleading a recaption, the facts of the case will not warrant him in so doing, for he must show a recaption before the exhibiting of the bill. Now the bill was exhibited on the 15th day of November, and it does not appear by the affidavits that the prisoner returned to the custody of the marshal before the 21st. It is said, that the plaintiff ought not to be allowed to amend, because, the declaration being bad, he is driven to file another, to which the recaption, before the exhibiting of such other bill, will be an answer. But that is a sufficient reason for allowing the amendment. An amendment has been allowed in the term next after the term in which the declaration was delivered, because, otherwise, the action would have been lost by the statute of limitations; *Duchess of Marlborough v. Widmore*. (i)

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| (a) <i>Barnes</i> , 7. | (b) 7 T. R. 474. |
| (c) 1 East, 133. | (d) <i>Barnes</i> , 16. |
| (e) <i>Barnes</i> , 26. | (f) 1 Str. 638. |
| (g) 2 Wils. 256. | (h) 2 B. Moore, 566. |
| (i) Cited in 1 Wils. 149. | |

So,

So, an amendment of the declaration has been allowed in a penal action, after the time limited for bringing a new action had expired. *Cross v. Kaye* (a), *Maddock* q. t. v. *Hammett* (b), *Petre v. Craft.* (c)

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ABBOTT C. J. When the matter was before me on the summons I thought that this was a fit case for a *stet processus*; but I now agree with my learned Brothers, in thinking the rule should be made absolute. There can be no doubt that the bill has been entitled generally of the term by mistake. Now, the rule undoubtedly is, that either party is at liberty to amend his pleadings before judgment. If we were to refuse to allow the amendment in this case, by reason of any special circumstances not connected with the record, but brought before us by affidavit, it would be difficult to avoid refusing liberty to amend in other cases, by reason of special circumstances disclosed to us by affidavit; and the consequence would be, that the Court might be called upon to inquire by affidavit into the circumstances of each particular case, in order to determine whether an amendment should be allowed or refused. I think that would produce great mischief; and upon the whole I am of opinion, that justice will be better administered by allowing amendments of pleadings to be made on reasonable terms, without reference to circumstances not connected with the record. Upon that ground I think that we ought to accede to the application in this cause, and that the rule should be made absolute.

Rule absolute.

(a) 6 T. R. 543.

(b) 7 T. R. 55.

(c) 4 East, 433.

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*Tuesday,
February 6th.*

HINDLEY against The Marquis of WESTMEATH.

Where a deed was made between husband, wife, and a trustee, providing a separate maintenance for the wife, and purporting to be made in contemplation of an immediate separation, but, in fact, no separation then took place, nor was intended to take place at that time : Held, that the deed was void.

Where, in pursuance of articles of separation securing a maintenance to the wife, she quits her husband's house against his wishes, and continues to live apart from him, although he is willing, and wishes to receive her back, and provide for her in his own house ; Semble, that he is not liable to be sued by tradesmen for debts contracted by her, even for necessaries.

A SSUMPSIT for goods sold and delivered. Plea, the general issue. The cause was called on for trial before Abbott C. J. at the London sittings after Michaelmas term, 1823, when by consent a verdict was taken for the plaintiff, subject to the award of a barrister, which he afterwards made as follows : " In pursuance of a certain order of reference made, &c., I do award, order, and determine that the verdict found for the Plaintiff by the jury be vacated, and that in lieu thereof a verdict be entered for the defendant, &c. I do also certify by this my award that I do find and determine that the Plaintiff is entitled to recover against the Defendant the sum of 52*l.* 19*s.* in respect of a debt incurred by the Defendant's wife, in case the Defendant's wife Lady *Westmeath* was living apart from the Defendant under a deed of separation, valid at the time that debt was incurred. As to this point I do find the following facts upon which my award is founded. On the 17th day of *December* in the year of our Lord 1817, a certain indenture in three parts was executed by the said Defendant, then the Earl of *Westmeath*, of the first part ; the Countess of *Westmeath* (his wife,) of the second part ; and *William Sheldon*, Esqr., of the third part. (This deed was then set out, by which it appeared that the parties did not then contemplate an immediate separation, but provision was thereby made for a future separation.)

" After

"After this deed was executed, the said Earl and Countess of *Westmeath* were fully reconciled to each other, and continued to live and cohabit together as man and wife. In *August* 1818 articles of separation, dated *May* 30th 1818, were executed by all the parties thereto. These articles were between the Earl and Countess of *Westmeath* of the one part, and Lord Viscount *Cranborne* and *Henry Widman Wood*, Esq., of the other part. And after reciting that the Earl of *Westmeath* had, at the particular instance, and at the sole desire of the said Countess of *Westmeath*, his wife, agreed to live separate and apart from her, and to allow to her and her assigns, during the joint lives of the said earl and the said countess, such separate maintenance and yearly provision for her and her child or children as was thereafter mentioned: It was witnessed, that in consideration of and in pursuance of such agreement, he the said Earl of *Westmeath* granted unto Lord Viscount *Cranborne* and *Henry Widman Wood*, their executors, &c., certain premises therein named, for the term of ninety-nine years, if the said earl and countess should jointly so long live, upon trust, first, to secure an annual sum of 1300*l.* for the first six years, for the sole use of the Countess of *Westmeath*, and payable to her, or such person as she might appoint, on certain specified days, with the usual powers to the trustees for that purpose, and then, in trust, to pay the surplus rents to Lord *Westmeath*. And it was thereby declared and agreed, that an additional yearly sum of 300*l.* was to be raised, for the maintenance and education of Lady *Rosa Nugent*, the then only child of the said Earl and Countess of *Westmeath*, an infant of the age of five years, or thereabouts: and of the child whereof the said countess was

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then *enceinte*. But if either the said Lady *Rosa Nugent*, or the said child, of which the said countess was then *enceinte*, should die before the expiration of six years from the date of that indenture, the yearly sum of 250*l.* only should be raised and paid, for the maintenance and education of such surviving child, in lieu of the sum of 300*l.*; and if both the said children should die before the expiration of the six years, then from and immediately after the death of such children, the said sum of 300*l.*, or 250*l.*, as the case might be, should cease, or not be raised or paid. The deed also contained a proviso, that on the death of either the Earl or Countess of *Westmeath*, or other cessation of the said annuities, the term thereby granted should cease, in case all arrears had been then fully paid. The deed then contained covenants by the Earl of *Westmeath* with the trustees, for payment of the above annuities of 1300*l.* and 300*l.*, and that he should not, after the execution of the deed, intermeddle or concern himself with any of the monies which should be paid or come to the hands of the Countess of *Westmeath*, by reason of that indenture, or the trusts thereinbefore expressed, but that he would permit the trustees, in trust, for the Countess of *Westmeath*, and also the Countess of *Westmeath*, to have and receive the said annual sums or yearly rents, and every part thereof; and also, that it should be lawful for the Countess of *Westmeath*, notwithstanding her *coverture*, and as if she were sole and unmarried, by any deed or writing, or by her last will at her pleasure, to dispose of the arrearages of the said several sums or yearly rents; and also all her savings, and the proceeds of the said sums, and all and singular sum and sums of money, goods, chattels, and effects, and personal estate whatsoever,

ever, which she should at any time have, or which should in anywise devolve or come to her during her life, to such persons as she should think fit; and that he the Earl of *Westmeath*, should suffer such will to be proved and acted on without obstruction, in the proper ecclesiastical court; and that upon receipt or disposal of all or any sum and sums of money, she the Countess of *Westmeath* should and might, notwithstanding her *coverture*, and as if she were sole and unmarried, make and sign valid acquittances; and moreover, that the Countess of *Westmeath* should and might, notwithstanding her *coverture*, live separate and apart from the Earl of *Westmeath*, her husband, as if they were sole and unmarried; and that she the Countess of *Westmeath* should from thenceforth be freed and discharged from the power, command, restraint, controul, authority, and government of the Earl of *Westmeath*, and should and might live and reside in such place and places, and in such manner as to her should from time to time seem meet; and that he the Earl of *Westmeath* should not molest or disturb the Countess of *Westmeath* in her manner of living, nor should at any time or times thereafter require, or by any means whatsoever, either by ecclesiastical censures, or by taking out any process, or by commencing or instituting any suit whatsoever, to compel her, the Countess of *Westmeath*, to cohabit or live with him the Earl of *Westmeath*, nor should or would for that purpose otherwise use any force, violence, or restraint to the person of her the Countess of *Westmeath*, or sue or molest, or cause to be sued or molested, any person or persons whatsoever, for receiving, harbouring, lodging, protecting, or entertaining her the Countess of *Westmeath*. But that she the Countess of

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Westmeath should and might in all things live as if she were sole and unmarried, without the restraint or coercion of the Earl of *Westmeath*, or any other person or persons by his means, privity, or procurement. The deed contained a covenant for further assurance, and other usual covenants for the protection of the trustees.

"For a short time before, and at the time when these last articles were executed, Lord and Lady *Westmeath* had been and were living together in the same house, apparently on friendly terms, and apparently also as man and wife. They continued so to live together after these last articles of agreement were executed. During this period, namely, in November 1818, Lady *Westmeath* was delivered of a son and heir, and on that occasion Lord *Westmeath*, who was then residing in the same house with her, and attending her with great affection, communicated the intelligence to his and her friends and relations, and received their congratulations on the event. Subsequently to this period, at Christmas 1818, Lord and Lady *Westmeath* visited Lady *Westmeath's* father and mother, the Marquis and Marchioness of *Salisbury*, at *Hatfield*. During that visit they jointly occupied their usual suite of apartments there, and appeared to Lady *Salisbury* and the rest of the family as living together on friendly terms, and in the usual manner as man and wife. They continued to live together in this way, and their mutual friends and acquaintance were not aware that they were not living together as man and wife. In fact, however, for a short time before and from the period of the execution of the last articles of agreement, Lord and Lady *Westmeath* had occupied different beds, and did not cohabit together, and this was known to the immediate personal attendant

attendant of Lady *Westmeath*; and on the part of Lady *Westmeath* there was in fact no real return of affection and kindness towards Lord *Westmeath*, after the execution of the last deed of separation. This continued till *May* 1819, when it became apparent to their friends and relations, that they were not living on good terms with each other. In *June* 1819, Lady *Westmeath*, against the will and entreaties of Lord *Westmeath*, finally quitted his house, and ceased to reside with him. They have lived altogether separate ever since that period, but always against the wish, and contrary to the entreaties of Lord *Westmeath*, who during the whole period was ready and willing to have received and provided for Lady *Westmeath* in his own house. Notwithstanding this, Lady *Westmeath* afterwards, in *November* 1819, whilst so living apart from her husband, the defendant, against his will, and contrary to his entreaties that she would return to his house and reside with him, contracted a debt with the plaintiff for goods to the amount of 52*l.* 19*s.* This was the debt in question in the present case. I was of opinion under the above circumstances, that the deed of separation executed in *August* 1818, was not intended to be accompanied by an immediate actual separation of the parties at the time it was executed. And that, not being accompanied nor intended to be accompanied by such actual separation, it was not valid from the beginning. And I also thought, that if valid at first, it had been avoided by what amounted to a subsequent reconciliation of the parties."

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A rule nisi for setting aside this award having been obtained, the Court directed the question to be argued as a special case, and it was accordingly now argued by

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Erle for the plaintiff. The question in this case depends upon the validity or invalidity of the deed executed in *August 1818*. Two objections will be made to that instrument; first, that it was intended to provide not for a present but a future separation; and, secondly, that the subsequent reconciliation of the parties put an end to the covenants in the deed. In support of the first objection, the defendant must rely on the case of *Durant v. Titley* (a), but that is perfectly distinguishable from the present case. The declaration there was in covenant on a deed of separation, and the covenant set out was a covenant to pay a certain sum for the use of the wife in case she should live separate and apart from her husband. It was manifest on the face of the deed, that the parties contemplated present cohabitation and future separation. The deed in question applies in terms to a present separation, and the finding of the arbitrator, that in his opinion an immediate separation was not contemplated by the parties, cannot render that deed void. Secondly, if the deed was originally good, it has not since become void in consequence of any reconciliation between the parties. Upon that point the arbitrator has found, that for a short time before and at the time when the deed was executed, Lord and Lady *Westmeath* had been and were living in the same house *apparently* on friendly terms, and *apparently* as man and wife. From that finding it may be inferred, that the arbitrator considered that they were not really living on friendly terms, and he afterwards expressly finds that there was no return of affection on the part of Lady *Westmeath*. Now, the mere circumstance that

(a) *7 Price, 577.*

husband

husband and wife have lived under the same roof, without any actual reconciliation, has never been held sufficient to vacate articles of separation, *Bateman v. Ross* (a), *Fletcher v. Fletcher*. (b) The claim to have this deed considered void, is analogous to insisting upon a forfeiture, in which case strict evidence is necessary. Here there is no such evidence of reconciliation. By the statute *Westminster 2. c. 34.* a woman quitting her husband and living in adultery, loses her claim of dower, “*Nisi vir suus sponte et absque coercione ecclesiae eam reconciliet et secum cohabitare permittat.*” Whereupon *Lord Coke* makes the following comment. (c) “Note, that cohabitation is not sufficient without reconciliation made by the husband *sponte*, so as cohabitation only in the same house with the husband availeth her not.” In the present case there was neither cohabitation nor reconciliation. The offer on the part of the husband to take back the wife, is equally unable to destroy the effect of the deed, *Guth v. Guth* (d), *Seeling v. Crawley*. (e)

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HINBLEY
against
The Masque of
WESTMEATH.

Brodrick contra. No attempt has been made to question the authority of the decision in *Durant v. Titley*; nor has it been disputed that if it had appeared on the face of the deed of *August 1818*, that an immediate separation was not contemplated by Lord and Lady *Westmeath*, that deed would have been void. But the finding of the arbitrator supplies that omission, and is equivalent to the verdict of a jury. Now, had an issue upon that fact been raised before a jury, and they had found in the same terms as the arbitrator that the parties

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| (a) 1 <i>Dow.</i> 235. | (b) 2 <i>Cox.</i> 99. 3 <i>Br. C. C.</i> 619. n. |
| (c) 2 <i>Inst.</i> 436. | (d) 3 <i>Br. C. C.</i> 614. |
| (e) 2 <i>Vern.</i> 386. | |

at

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HINDLEY
against
The Marquis of
WESTMEATH.

at the time when the deed was executed lived together, and did not intend to separate, and did not in fact separate, that would have sufficed to shew that the deed was void; in the same manner as the verdict of a jury finding that a deed was executed in pursuance of an usurious agreement renders the deed void, although no such agreement appears upon the face of the deed. In this case the separation was to take place at the mere will and caprice of the wife; the matter was not to be decided by any domestic tribunal, as in *Lord Rodney v. Chambers* (a), and in *Chambers v. Caulfield*. (b) In *St. John v. St. John* (c), Lord *Eldon* says, “No case has gone to this extent, that the husband may enter into a contract not to separate upon the ground of differences existing at the moment, but determining that it is fit at that moment to live together, to leave it altogether to the discretion of the wife to say whether that cohabitation and performance of duty to the children by their keeping together is to continue a month or six weeks, or that either shall regulate how long they shall continue to live together upon the principle that party shall think proper.” Then, upon the second point, it is unnecessary to dispute any of the cases which have been decided as to the effect of reconciliation. The only question is, what amounts to such a reconciliation as will put an end to articles of separation. *Bateman v. Ross* has been relied on for the plaintiff, but the circumstances there were wholly different from those which have been found by the arbitrator in this case. Lord *Eldon*, in giving his opinion in that case, said, “In regard to the point of reconciliation, notwithstanding what might be found

(a) 2 *East*, 283.(b) 6 *East*, 244.(c) 11 *Ves.* 534..

in

in some of the reports, he held the general doctrine to be clear, that a reconciliation after a separation entirely did away with the effects of it. This rested upon the ground of public policy, as it must not be permitted to parties to make agreements for themselves, to be held good whenever they chose to live separate. The question then was, whether in that case there was a reconciliation. It appeared to him there was not, unless their Lordships were prepared to say that living under the same roof amounted to a reconciliation, *though in a state of the highest animosity;*" and Lord Redesdale observed, that "the appellant was living at *Castle Gore*, the respondent went there, not for the purpose of reconciliation, but to protect her property." In this case there is nothing to shew that the parties lived under the same roof in a state of animosity; they were apparently on friendly terms, and living as man and wife; their nearest relations, and most intimate friends supposed such to be the fact, and no one but the immediate personal attendant of Lady *Westmeath* was aware that they occupied separate beds, and that matrimonial cohabitation did not take place between them. If it can be contended that a reconciliation is not complete for the purpose of avoiding a deed of separation unless such cohabitation actually takes place, inquiry must be made as to that fact, even supposing the parties to occupy the same bed; the inconvenience and impropriety of such inquiries is so apparent that the Court will never sanction them. It is clear that when the parties were living together in the manner found by the arbitrator, the husband would have been liable for the wife's debts, contracted for articles suitable to her station; and that is a reasonable test whereby the Court may try whether they were

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WESTMEATH.**

living

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against
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WESTMINSTER.

living together as husband and wife. There is a very obvious distinction between the passage quoted from the *2 Inst.*, as to dower, and this case. The words of the statute render both reconciliation and cohabitation necessary to restore the wife's claim of dower. But there also *cohabitation* means nothing more than living in the same house with the husband. The form of this deed differs very essentially from that which is usually adopted, for there is not any covenant to indemnify the husband against the debts of the wife, which covenant, in *Jee v. Thurlow* (a), was relied upon by *Holroyd* J. as a reason for holding the deed good, that being a valuable consideration; and the same observation was made in *Legard v. Johnson*. (b)

Erie in reply. The arbitrator has not absolutely found that no present separation was intended to take place upon the execution of the deed; he has merely stated his opinion upon the facts, leaving that to the revision of the Court; the question is, therefore, open to their consideration. As to the reconciliation, the case of *Bateman v. Ross* was not cited as a case coinciding in circumstances with the present, but as establishing the principle that cohabitation or living together without reconciliation would not avoid a deed of separation. Then as to the last objection made, that there is no covenant to indemnify, that cannot have any weight, for it is perfectly clear that a consideration is not essential to the validity of a deed. The absence of it may be a reason which will prevent the interference of a court of equity, as in *Legard v. Johnson*, or a deed without such

(a) 2 B. & C. 547.

(b) 3 Ves. 352.

a cove-

a covenant or other consideration may not be considered good against creditors, but in a court of law the omission cannot have any effect. This accounts for the observation in *Jee v. Thurlow*, and the cases there referred to; but in *Nunn v. Wilsmore* (*a*), and *Fitzer v. Fitzer* (*b*), it was held that such a covenant was not essential to the validity of the deed.

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ABBOTT C. J. I am of opinion that the award made by the arbitrator in this case is good, and that the verdict must, according to his direction, be entered for the defendant. The action, which was for goods sold, was brought by a plaintiff who had given credit to Lady *Westmeath*. Now a person cannot by law sue a husband for the price of goods furnished to his wife, when living separate and apart from him, unless it can be shown that she was so living with his consent; but in this case it is found by the arbitrator that Lady *Westmeath* was living separate from her husband against his wish, and contrary to his entreaties, and that he was always ready and willing to have received and provided for her in his own house. The creditor must, therefore, in support of his claim, rely on some deed valid in law, whereby the defendant has bound himself irrevocably to allow his wife to live separate and apart from him. In considering whether there be any such instrument, it is important to look at the first deed executed between these parties in December 1817, for the validity of which it is impossible to contend. That was in terms like the deed before the Court in *Durant v. Titley*. It shows that there had been differences between Lord and Lady

(*a*) 8 T. R. 521.(*b*) 2 Atk. 511.

Westmeath,

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Westmeath, and that he had agreed to convey lands as a security for the separate maintenance of Lady *Westmeath* in case further differences should arise, and they should cease to live together. After the execution of that deed, the parties continued to live together, and what has been called matrimonial cohabitation took place; for that deed was executed in December 1817, and in November 1818 Lady *Westmeath* was delivered of a son, of which Lord *Westmeath* was the father. In the meantime, in the month of August 1818, another deed was executed, and from this deed it would appear that the parties then separated, but the arbitrator has found that in fact no separation did then take place, that they continued to live together apparently on friendly terms, and apparently as man and wife; and that their mutual friends and acquaintances were not aware that they were not living together as man and wife. The arbitrator has, then, given his opinion that the deed was not intended to be accompanied with an immediate separation. I think that conclusion was rightly drawn from the facts, and even if an actual separation had taken place, if that was not intended, the deed would not be good. It appears also that the deed of August 1818, provides for the payment of the annuity on certain days; now it is clear that if Lady *Westmeath*, whilst she continued to live with her husband, had contracted debts which husbands are ordinarily bound to pay, Lord *Westmeath* would have been liable for them; but if the deed is to be taken to the letter, he would also be liable to pay to the trustees the sum thereby secured and agreed to be paid. Upon the whole of this case it appears to me, that the finding of the arbitrator is perfectly correct, and then, according to the authorities, it is clear that the deed is void. I have given

given my opinion upon this ground, because it appeared to be the principal question reserved by the arbitrator for the decision of the Court; but I would by no means be understood to say that the plaintiff could, merely on the ground of the existence of such a deed as this, if it were valid, sue the husband for goods supplied to the wife living apart from him without his assent; on the contrary, I am much disposed to think that he could not, but that the trustees would be bound to obtain the money from the husband, and pay the wife's debts, and that the only remedy of the plaintiff would be to claim payment out of that fund.

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WESTMEATH.

BAYLEY J. If a husband improperly compels his wife to leave his house, he thereby gives her power to pledge his credit for necessaries; but if she goes away without his consent and against his will, I am of opinion that a tradesman giving her credit does so at his peril. If under such circumstances a deed is executed by the husband, securing a provision to the wife, I think that he cannot be sued by any person who may supply goods to the wife, but that he is only liable to the trustees for the money which he has covenanted to pay, which was the form of action adopted in *Jee v. Thurlow*. Such a mode of proceeding will make him liable to the extent of his covenant, and not to an indefinite amount, subject to no limitation, provided a jury can be prevailed upon to think that the articles furnished are necessaries, taking into consideration the rank and station of the wife. It is not, however, necessary to decide the case upon that ground, for the special finding of the arbitrator raises the question whether the deed be or be not valid, and I concur with my Lord Chief Justice in thinking it invalid.

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against
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WESTMEATH.

The case of *Durant v. Titley* shows clearly that the first deed was bad, inasmuch as it provided not for an immediate but a future separation of the parties. The arbitrator appears to have thought that the second deed, made apparently to provide for an immediate separation, when such a measure was not intended, was a shift and contrivance to avoid the legal objection existing to the first deed, and in that view of the case I fully agree. The parties were not separated. The mere abstinence from marital cohabitation does not amount to a separation. They continued for some time to live apparently on friendly terms; their nearest friends did not know the fact to be otherwise; *res ipsa loquitur*, it is manifest that an immediate separation was never contemplated. The deed is therefore void, and the creditor, who but for the deed could have no right of action, (the defendant's wife having left him not only without his assent, but against his entreaties that she would remain with him,) cannot recover.

HOLROYD J. I also think that the award of the arbitrator is right. The material fact found by him is, that the wife lived apart from her husband without his consent. The creditor, therefore, can have no right of action unless the husband was bound to leave her at liberty to live apart from him, if she thought fit to do so. Upon the question whether, under such circumstances, a creditor could sue the husband for a debt contracted by the wife, I do not at present pronounce any opinion; but there would be great difficulties in the way of such a proceeding. This is a very different case; the deed relied upon by the plaintiff is not a valid instrument; it imports that a present separation was intended.

intended, but the facts found by the arbitrator show the contrary.

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against
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WESTMEATH.

LITTLEDALE J. If a separation takes place between a man and his wife in pursuance of a valid agreement, and that contains no provision for the maintenance of the wife, the husband must be liable for necessaries provided for her. But if a provision is made and regularly paid he is not liable. If a provision is made by the agreement, and not paid, then, according to the opinion of three Judges, in *Nurse v. Craig* (a), the husband is liable for the wife's debts, although *Mansfield* C. J. was of a different opinion. Here, however, the deed of separation, although appearing on the face of it to be good, was void, being made, according to the finding of the arbitrator, to provide for the future separation of the parties. The case must therefore be treated as if no such deed existed; and then it is clear that the plaintiff cannot recover for goods furnished to the wife when living apart from the husband against his consent. For these reasons I think that the award directing a verdict to be entered for the defendant is right.

Postea to the defendant.

(a) 2 N. R. 148.

1827.

*Tuesday,
February 6th.*

DAVIES against PENTON.

A. agreed with *B.* to sell to him the stock and the good-will of his business, and to demise to him his house in which the business was carried on, for which *B.* was to pay 800*l.*, and to take furniture and fixtures at a valuation. They were afterwards valued at 174*l.* 400*l.* was paid to *A.* at the time of executing the agreement, and *B.* agreed to accept and pay two bills of exchange, one for 400*l.*, payable twelve months after date, and the other for 174*l.*, payable two months after date; and *A.* agreed not to carry on the business within five miles of the house. And for the true performance of this agreement either of them did thereby bind and oblige himself to the other of them *in the penal sum of 50* recoverable for breach of the said agreement in a court of law, as and by way of dated damages : Held, that this sum was a penalty and not liquidated damages.

In an action against *A.* for breach of the agreement for carrying on the business five miles, he pleaded, that *B.* did not well and truly pay and discharge the two bills of exchange according to the agreement, but therein made default, and that the said sum of 500*l.* mentioned in the agreement became forfeited; and he further pleads that before the commencement of the suit, *B.* was indebted to him (*A.*) in the further sum of 500*l.* for work and labour, &c.

Replication (except as to so much of the plea as related to the first sum of 500*l.* mentioned), that the plaintiff in 1825 had become bankrupt and obtained his certificate as to so much of the plea as related to that sum, there was a demurrer: Held, that the plaintiff was entitled to judgment upon the demurrer, although it appeared by other of the record, that since the making of the agreement he had become bankrupt, a new interest in the agreement had vested in his assignees.

subject to the yearly rent of 80*l.*; and the stock in trade to be taken and purchased by plaintiff at a fair valuation; and that in part pursuance of the agreement, defendant had accordingly demised to plaintiff the said messuage or tenement, with all and singular the appurtenances, for the term of nineteen years and one quarter of a year, wanting two days, from the 25th of *December* 1823, at the yearly rent of 80*l.* The articles of agreement then stated that defendant, in further pursuance of the said agreement, and for and in consideration of 400*l.* to the defendant in hand paid by the plaintiff at or before the signing of the articles of agreement, and for and in consideration of the further sum of 400*l.* (being the remainder of the said sum of 800*l.* consideration money thereinbefore mentioned,) secured to be paid to defendant by a bill of exchange, bearing even date with the agreement, drawn by defendant upon and accepted by plaintiff for the said sum of 400*l.* and payable twelve months after date; and of the further sum of 170*l.* 4*s.* (being the ascertained value of the stock in trade, goods, fixtures, and effects used in and about the said business or profession, as agreed upon between plaintiff and defendant,) also secured to be paid to defendant by a certain other bill of exchange, bearing even date with the said agreement, drawn by defendant upon and accepted by plaintiff for the said sum of 170*l.* 4*s.*, and payable at two months after the date thereof, agreed to and with plaintiff in manner following; that is to say, that he defendant should permit plaintiff to have, use, and exercise the said business, practice, and profession of a surgeon, apothecary, and accoucheur, from 24th *December* 1823, and to carry on the same in and upon the same house and premises, and in the same way and manner as defendant had been

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used and accustomed to do; and to have, receive, and take the whole of the profits and produce of such practice and profession, to and for his own use and benefit; and that defendant should use his best endeavours and influence with all his patients and friends, to prevail upon them to employ plaintiff in the way of his said practice and business. And plaintiff did thereby agree to and with defendant, that he plaintiff would well and truly pay and discharge the said two several bills so drawn upon and accepted by him plaintiff, for the sums of 400*l.* and 170*l.* 4*s.* as aforesaid unto defendant, as and when the said bills of exchange respectively became due and payable; and the defendant did by the said articles of agreement, lastly, promise and agree to and with plaintiff, that he, defendant, should not, nor would at any time thereafter, use, exercise, and carry on the art, business, or profession of a surgeon, apothecary, or accoucheur, within the distance of five miles from the said messuage, being No. 12. in *Great Surrey Street* aforesaid, for his own private benefit or emolument, in any manner howsoever; and for the true performance of all and singular the agreements aforesaid, each of them, defendant and plaintiff, did thereby bind and oblige himself unto the other of them, in the penal sum of 500*l.*, to be recoverable for breach of the said agreement, in any court or courts of law, as and by way of liquidated damages. The declaration then stated mutual promises. Breach, that the defendant did use, exercise, and carry on the business or profession of a surgeon, apothecary, and accoucheur, within the distance of five miles from the said messuage. Plea, that plaintiff did not well and truly pay and discharge the said two several bills of exchange, according to the form and effect of the articles

ticles of agreement in that behalf, but wholly neglected and refused so to do, and therein failed and made default; and thereupon and according to the tenor and effect, true intent and meaning, of the articles of agreement, the plaintiff forfeited and became liable to pay to defendant the said sum of 500*l.* in the articles of agreement mentioned, as and by way of liquidated damages. The plea then alleged further, that the plaintiff at the commencement of the suit was indebted to the defendant in the further sum of 500*l.* for work and labour, &c. &c. Replication (except as to so much of the plea as related to the penal sum of 500*l.* first mentioned), that plaintiff before and on the 23d *December* 1823 was a trader, &c.; and that in *October* 1824 he became bankrupt, and on the 27th *May* 1825 obtained his certificate: demurrer to so much of the plea as related to the sum of 500*l.* first mentioned.

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 DAVIES
against
 FENTON.

The *Solicitor-General* in support of the demurrer. The 500*l.* mentioned in the agreement is clearly a penalty, and not liquidated damages; and if so, it cannot be the subject of set-off; for the statute 8 G. 2. c. 24. s. 5. only enables the defendant to set off the sum justly and truly due, *Nedriff v. Hogan.* (a) If it be liquidated damages, then it will follow that if any part of the sum secured by the bills, however small, remain unpaid, the defendant will be entitled to recover the whole sum of 500*l.* Now it cannot have been intended that 500*l.* should be paid in default of the payment of the bill of 170*l.* 4*s.* only, if the other bill were paid. If either of the bills were paid, the defendant ought to

(a) 2 *Burr.* 1024.

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against
 PENTON.

receive more than 500*l.*; yet if this be liquidated damages, he could recover no more. In this case the word "penalty" is used in the agreement as well as the words "liquidated damages." It is a general rule, applicable to this case, that wherever the payment of a smaller sum is secured by a larger, the latter is to be considered a penalty, *Astley v. Weldon.* (a)

Chitty contrà. In *Astley v. Weldon* there were several small fines agreed to be paid for misconduct, which showed clearly that it could not be intended that the whole penalty should be paid for every breach of the agreement. In *Barton v. Glover* (b), where the parties entered into an agreement, by which, in consideration of a sum to be paid by the plaintiff, the defendant undertook to withdraw his stage-coach from the road, Lord Chief Justice Gibbs intimated a strong opinion that the sum was not to be considered a penalty, but damages ascertained between the parties. [Holroyd J. The consideration must be co-extensive with the promise: that was decided in *Rann v. Hughes.* (c) Now what consideration is there in this case for the promise to pay 500*l.* in case 100*l.* only be due?] In *Reilly v. Jones* (d) the plaintiff and defendant entered into articles of agreement, by which the former, in consideration of 2300*l.*, agreed to sell to the latter the lease of a public-house, as he then held the same for the remainder of his term, and also his goods, fixtures, and effects at a valuation; and the defendant agreed to take the assignment of the lease, and pay the above sum for it, as also the amount

(a) 2 *Bos. & Pul.* 346.(b) *Holt's N. P. C.* 45.(c) 7 *T. R.* 350. n.(d) 1 *Bingh.* 302.

of the goods, fixtures, and effects, and take possession of the premises on a given day, when the plaintiff agreed to give up possession of the said premises, goods, and effects, to assign licences, to repair or allow for all damaged outside windows, and to clear the rent and taxes to the day of quitting possession; and the expenses of the agreement were to be paid by the parties in equal moieties; and it was, lastly, agreed, that on either party's not fulfilling all and every part of the agreement, he should pay to the other 500*l.* thereby settled and fixed as liquidated damages: it was held, that this latter sum was not a mere penalty to recover such damages as might be actually incurred by the non-performance thereof; but that, on a breach by the defendant for refusing to accept an assignment of the lease, or take possession, he was liable to pay to the plaintiff the full amount of that sum. But supposing that to be otherwise, it appears that the plaintiff has no right to sue; for the replication shows that after the agreement he became bankrupt, and consequently the right of action vested in his assignees. [Bayley J. The plea of set-off goes to the whole declaration, the replication of the plaintiff's bankruptcy only to part of the plea. The demurrer is to the residue; and upon this demurrer the defendant cannot avail himself of the replication.]

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DAVIES
against
PENROS.

ABBOTT C. J. I consider that this action is brought to recover, not a sum certain by way of liquidated damages, but so much as the plaintiff can get by way of damages; for this is a special action on the case, in which the plaintiff is entitled to recover damages in proportion to the injury stated in his declaration. Now debt

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against
PENTON.

debt is the proper form of action to recover a sum certain. The defendant has pleaded that the plaintiff did not well and truly pay and discharge the said two several bills of exchange as and when the said bills became due and payable, but wholly neglected so to do. Now this allegation would be satisfied by proving that one of the bills was paid on the very day on which it became due, and that the other was paid on the day after it became due. But inasmuch as in that case there would have been a breach of the agreement, the defendant must contend that the plaintiff was liable to pay the whole sum of 500*l.* That certainly would be a very absurd agreement; and before we hold that to be the legal effect of it, we ought to be clearly satisfied that such was the intention of the parties. Whoever framed this agreement does not appear to have had any very clear idea of the distinction between a penalty and liquidated damages; for the sum of 500*l.* is described in the same sentence as a penal sum and as liquidated damages. Now both expressions cannot be satisfied. We must therefore look to the whole of the agreement in order to ascertain whether the 500*l.* was intended to be a penalty or liquidated damages; and, considering the whole agreement, we think it was clearly intended as a penalty to secure such damages as the party injured ought to receive. Then as to the other point, it is said that the plaintiff upon certain parts of the record has set forth his bankruptcy, and that as it appears upon the whole record that his assignees are entitled to the benefit of the contract stated in the declaration, the plaintiff cannot have judgment upon this demurrer. But in considering what judgment we are to pronounce upon this demurrer, we are bound to look only to that part of

of the record upon which the demurrer arises, and not at the other collateral parts of the record not connected with it; and, looking to that part of the record upon which the demurrer arises, we are of opinion that the plaintiff is entitled to the judgment of the Court.

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DAVITS
against
PEERSON.

BAYLEY J. We must look at all the parts of this instrument, in order to ascertain whether it was the intention of the parties that the sum of 500*l.* should be a penalty or liquidated damages. Now where the sum which is to be a security for the performance of an agreement to do several acts, will, in case of breaches of the agreement, be in some instances too large and in others too small a compensation for the injury thereby occasioned, that sum is to be considered a penalty. It could not have been intended here to fix the sum of 500*l.* as a maximum, if nothing was paid in respect of either of the bills, for in that case the party would be entitled to receive 574*l.* In that case 500*l.* would be too small a compensation for the breach of the agreement. On the other hand, if the 400*l.* bill had been paid, and that for 174*l.* alone remained unpaid, the 500*l.* would much exceed a fair compensation for that breach of the agreement. As to the other point, in arguing the question whether the defendant or the plaintiff is entitled to judgment upon this demurrer, neither of them has a right to have recourse to any parts of the record not connected with that upon which the demurrer arises. If the defendant had intended to rely on the bankruptcy as a bar to the plaintiff's right to recover, he should have pleaded it; and the plaintiff in that case might have replied that the assignees had repudiated the contract.

HOLROYD

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against
PENTON.

HOLROYD J. I am also of opinion, that the sum of 500*l.*, which in the agreement is called a penalty, is to be considered a penalty, although it is stated that it is to be recovered as and by way of liquidated damages. We must look to the nature of the agreement and of the sum to be paid, in order to ascertain whether the sum of 500*l.*, which was to secure the performance of the agreement, was intended to be a penalty or liquidated damages. The parties call this a penal sum. The sum which is to be paid, and the payment of which is to be secured by the penal sum, is 574*l.* Now 500*l.* cannot have been the amount of damages agreed upon for the non-payment of 574*l.* If it is a penalty, the Court will treat it as such; and the stipulation that it shall be recovered as liquidated damages will not prevent the party from insisting on the compulsory provision of the stat. 8 & 9 W. 3. c. 11. s. 8. as to assessing damages. I entirely agree with my Brother Bayley, that the defendant cannot claim in aid the other parts of the record, to show that the plaintiff is not entitled to judgment upon the demurrer.

LITTLEDALE J. It seems to me, also, that the plaintiff must have judgment. Before the 8 & 9 W. 3., the whole penalty might be recovered at law; and the party against whom it was recovered was driven to seek relief in a court of equity. That statute only contains the word "penalty." Since the statute, parties, in framing agreements, have frequently changed that word for *liquidated damages*; but the mere alteration of the term cannot alter the nature of the thing; and if the Court see, upon the whole agreement, that the parties intended the sum to be a penalty, they ought not to allow one party to deprive the other of the benefit to be derived from the

the statute. Now I think it clearly appears, from the whole of this agreement, that the sum of 500*l.* was intended as a penalty, to secure the performance of the agreement. Then it is said, that the plaintiff has no right of action, because it appears upon the record that he had become bankrupt. As to one sum, the plaintiff says, "that he has obtained his certificate." Then he demurs to the other parts of the plea. But supposing any thing turned on the question of bankruptcy, we should be bound to decide on the plea and demurrer following one another. We must treat the count, plea, and replication, and the count, plea, and demurrer, as distinct records, and give judgment upon each without reference to the other.

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 DAVIES
against
PENTON.

Judgment for the plaintiff.

DAVIS against HARDY.

 Thursday,
February 8th.

THIS was an action against the defendant for maliciously, and without any reasonable or probable cause, indicting the plaintiff for embezzlement at the July sessions for the county of Somerset, 1825. Plea, Not guilty. At the trial before Gaselee J., at the Spring Assizes for the county of Somerset, 1826, the following appeared to be the facts of the case: In 1823, *Hardy*, the defendant, was the keeper of Ilchester gaol, and *Davis*, the plaintiff, was a turnkey; and in May 1823 the defendant *Hardy* directed *Davis* to take to Taunton

Upon the trial of an action for maliciously indicting the plaintiff, without reasonable or probable cause, the plaintiff proved a case, which, in the opinion of the learned judge, showed that there was no reasonable or probable cause for preferring the indictment. The

defendant then called a witness to prove an additional fact, and that being proved, the learned Judge was of opinion, that there was reasonable and probable cause for preferring the indictment: Held, that there being no contradictory testimony as to that fact, and there being nothing in the demeanour of the witness who proved it to impeach his credit, the learned Judge was not bound to leave it to the jury to find the fact, but that he might act upon it as a fact proved, and nonsuit the plaintiff.

a debtor

1827.

DAVIS
against
HARDY.

a debtor named *Martin* (against whom a commission of bankrupt had issued), to be examined before the commissioners; *Davis* took the prisoner to *Taunton*, and there received from the assignee of the bankrupt the expences of the journey, and amongst others, *Hardy's* fee, and also 1*l.* 10*s.* for the hire of a post-chaise. *Davis*, on his return to *Ilchester*, paid *Hardy* his fee, but did not tell him that he (*Davis*) had received the amount of the chaise-hire from the assignees.

In *April 1825*, the justices in sessions referred to certain magistrates for investigation some charges against *Davis*, preferred by *Hardy*, of which one was that he had not paid to *Hardy* the chaise-hire he had received from the assignee of *Martin*. One of the magistrates who investigated that charge, was examined as a witness. He stated, that *Davis* admitted that he had received the chaise-hire from the assignee and had not paid it to *Stainer*, the proprietor of the chaise, or to *Hardy*; but he was not sure whether *Davis* admitted that he had desired *Stainer* not to tell *Hardy* that the chaise-hire had not been paid. It appeared that *Stainer* was then examined respecting this charge; and the report of the investigating magistrates was made on the 30th of *April 1825*, in consequence whereof *Davis* was suspended from his office. At the close of the plaintiff's case, the defendant's counsel objected that as *Davis* had received the amount of the chaise-hire, and had not paid it either to the proprietor or to *Hardy*, and had not mentioned to the latter that he had received it, there was probable cause for preferring the indictment, and that the plaintiff must therefore be nonsuited. The learned Judge thought that there was sufficient proof of want of probable cause; and the defendant then proceeded with

with his case, and called as a witness *Stainer*, the proprietor of the chaise. He stated, that in 1823 *Hardy* was his customer, and that *Davis*, on the 25th of May 1823, ordered the chaise in his (*Hardy's*) name to go to *Taunton*: he did not see *Davis* for a month or two afterwards, but when he did see him, he asked him when he meant to pay him the money he owed him. *Davis* said he owed him for some post-chaise hire of his own; to which *Stainer* replied, "If you cannot pay me for what you owe me yourself, pay me for the job to *Taunton*, or I will tell Mr. *Hardy*." *Davis* then requested *Stainer* not to tell Mr. *Hardy*, for it would do him a great deal of injury. *Stainer* saw *Davis* again in about a month, when *Davis* promised to pay him; he stated further, that he did not tell *Hardy* that the chaise had been ordered in his name till he heard that *Davis* had been suspended upon some charges that had been presented against him, and on cross-examination as to the time when he had been paid by *Hardy*, he said first it was a week or two after the examination, then a very short time before the indictment, then a day or two before the investigation. *Gaselee J.* said, that as it then appeared that *Davis* had desired *Stainer* not to communicate to *Hardy* that the chaise-hire had not been paid, he was of opinion that that circumstance, coupled with the fact of *Davis's* not having mentioned to *Hardy* his having received it from the assignee, (though not sufficient to support the indictment,) afforded a probable cause for preferring it. The counsel for the plaintiff then insisted that it ought to be left to the jury to find whether they believed *Stainer's* evidence. The learned Judge said that there was no contradictory evidence, as to the fact of *Davis* having desired *Stainer* to conceal from *Hardy* that the chaise-hire had not been paid; and he refused

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refused to leave any question to the jury,' and nonsuited the plaintiff. A rule nisi for setting aside the nonsuit had been obtained in last *Easter* term, upon the ground that it ought to have been left to the jury to decide whether they believed *Stainer's* evidence or not.

Scarlett and *C. F. Williams* now showed cause. Where upon any particular fact there is contradictory evidence, or where in the absence of contradictory evidence, the witness speaking to a fact conducts himself so as to make his credit doubtful, the jury are to decide upon that fact, and the Judge ought to leave the question to their consideration. But here, the fact spoken to by *Stainer*, upon which the learned Judge came to the conclusion, that the defendant had reasonable and probable cause for preferring the indictment, is not in contradiction of any fact proved by the witnesses for the plaintiff, and there is no sufficient ground for saying that the demeanour of *Stainer*, in giving his evidence, was such as to render his credit doubtful; and that being so, in a case where the question was one compounded of law and fact, and the fact was proved by an uncontradicted witness, and one worthy of credit, it was competent to the Judge, in the exercise of his discretion, to act upon that fact as proved, and to decide accordingly.

Bompas and *Erle*, contrà. Probable cause is a question of law when the facts are ascertained. When, therefore, the facts proved on the part of the plaintiff show that the defendant had a probable cause for doing the act with which he is charged, the Judge acting upon that evidence may nonsuit the plaintiff, because it lay on him to prove the want of probable cause. But where the evidence given on the part of the plaintiff shows that the

the defendant had no reasonable or probable cause for doing the act complained of; and if the latter calls other witnesses to contradict or explain the facts proved by the plaintiff, the whole case ought to be submitted to the jury. The facts sworn to by the witnesses on one side are not to be taken as proved against the other side. The jury are to decide whether they are proved or not. *Ravenga v. Mackintosh* (a) and *Nicholson v. Coghill* (b) are authorities to shew, that in such a case as the present, the jury are to ascertain the facts, and to apply the law to those facts when ascertained, as it is propounded to them by the Judge. The learned Judge ought to have told the jury, that if they believed the facts sworn to by *Stainer*, in his opinion there was probable cause for preferring the indictment, and that there ought to be a verdict for the defendant. Instead of that, he entirely withdrew the case from the consideration of the jury, and took upon himself to decide the fact, whereby the plaintiff's counsel was deprived of the opportunity of remarking on the demeanour of the witness and the consistency of his evidence. *Stainer* in this case, in declaring that he had concealed from *Hardy* the non-payment by *Davis* till after his suspension, was contradicted by the magistrate, who stated that he, *Stainer*, had been examined upon the charge of the non-payment preferred by *Hardy* which led to the suspension, and also that *Stainer* had made varying statements as to the time when *Hardy* had paid him. The jury, and not the judge, ought to decide on the effect of such observations.

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(a) 2 B. & C. 693.

(b) 4 B. & C. 21.

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ABBOTT C.J. I think that the nonsuit in this case was proper, and that the rule for setting it aside must be discharged. The question for our consideration is not, whether *Davis* was guilty of the charge preferred against him, nor whether the indictment was preferred from an improper motive; but the question is, whether *Hardy* the prosecutor had a reasonable or probable cause for preferring the charge against *Davis*, and I am of opinion, upon the evidence given at the trial, that there was probable cause for his making that charge. The facts are these: *Davis* hired the chaise in the name of *Hardy*, and received from the assignee of the bankrupt the amount of the chaise-hire; he did not pay it to the innkeeper who let the chaise, nor to *Hardy*, in whose name it was hired, nor did he ever mention to the latter that he had received the amount. Upon a charge being preferred against him, he was examined before the magistrates, and one of the magistrates was called as a witness on the part of the plaintiff, and proved that he admitted most of the facts above stated. That being the case upon the part of the plaintiff, the learned Judge was of opinion that there was sufficient *prima facie* evidence of the want of probable cause for preferring the indictment, and he refused to nonsuit the plaintiff. *Stainer* the innkeeper, who was the proprietor of the chaise, was then called as a witness on the part of the defendant. He proved that the chaise-hire was not paid to him; that he applied to *Davis* twice for it; and that upon his threatening, that unless he was paid he would tell Mr. *Hardy*, *Davis* requested him not to tell Mr. *Hardy* that it was not paid, as it would do him a great injury. Now, if that fact, which was proved by *Stainer*, had been proved in the course of the plaintiff's case,

case,

case, there can be no doubt that it would have been evidence of a probable cause for preferring the charge: but it is said, that it ought to have been submitted to the jury as a question of fact, whether *Davis* ever did request *Stainer* not to inform *Hardy* that he, *Davis*, had received the money. But where a witness is unimpeached in his general character, and uncontradicted by testimony on the other side, and there is no want of probability in the facts which he relates, I think that a judge is not bound to leave his credit to the jury, but to consider the facts he states as proved, and to act upon them accordingly. I think, therefore, that the Judge was well warranted in coming to the conclusion in this case, that there was a probable cause for preferring the indictment, and this rule must therefore be discharged.

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BAYLEY J. I think that in this case there was sufficient evidence of probable cause, and such evidence, too, as a jury ought to be directed to proceed upon. If there is nothing in the demeanour of a witness, or in the story he tells, to impeach his credit, and he is not contradicted by testimony on the other side, it is not a case for a jury to deliberate upon. If the case had been submitted to the jury, and they had disbelieved this witness, I think that we should have been bound to send the case down to a new trial.

Rule discharged.

1827.

*Thursday,
February 8th.*

CROZIER against CUNDEY and Others.

Where a constable, having a warrant to search for certain specific goods alleged to have been stolen, found and took away those goods, and certain others also supposed to have been stolen, but which were not mentioned in the warrant, and were not likely to be of use in substantiating the charge of stealing the goods mentioned in the warrant : Held, that the constable was liable to an action of trespass.

TRESPASS for breaking and entering plaintiff's house, and seizing and taking away his goods. Second count, for seizing the goods. Plea, the general issue. At the trial before *Best C. J.* at the *Derbyshire* Lent assizes, 1826, it was proved that the defendants had entered the plaintiff's house and taken certain goods, viz. 100lbs. weight of cotton copps or thread, two packing-cases in which it was contained, and a tin pan and hair sieve. For the defendants, it was proved, that the cotton copps and packing-cases belonged to defendant, *Cundey*; that they had been stolen from him, and that the defendants (one of them being a constable, and the others acting as his assistant) went with a search-warrant, which was produced in evidence, granted by a magistrate, directing them to search the plaintiff's house for the 100lbs. weight of cotton copps; that they found the cotton in the packing-cases, and carried it away in them; they also took away the tin pan and sieve, which were claimed by *Cundey* as his property. The plaintiff had not demanded a copy of the warrant, which the Lord Chief Justice thought he was bound to do, according to the provision of the 24 G. 2. c. 46., and he directed a nonsuit, giving the plaintiff leave to move to enter a verdict for one shilling. In last *Easter* term a rule nisi for that purpose was obtained, against which

Reader

~~P~~eader now shewed cause, and contended, that the constable was not restrained from seizing other goods besides those mentioned in the warrant, if they appeared to have been stolen, and might be serviceable in the investigation of the felony mentioned in the warrant.

1827.

Clarke
against
Cundey.

~~C~~larke, contrà, was stopped by the Court.

ABBOTT C. J. The warrant produced in evidence authorized the seizure of certain articles, but unfortunately some other articles also were taken. If those others had been likely to furnish evidence of the identity of the articles stolen and mentioned in the warrant, there might have been reasonable ground for seizing them, although not specified in the warrant. But the tin pan and sieve were not such articles. I am therefore of opinion that the nonsuit cannot be supported. I have expressed myself in this manner in order to prevent the supposition, that a constable seizing articles not mentioned in the warrant under which he acts, is necessarily a trespasser. In this case there must be a verdict for the plaintiff for one shilling, but it must be on that count which merely charges the seizure of the goods.

Rule absolute.

1827.

*Friday,
February 9th.*

**BELCHER against SIKES and Others, Executors
of ALEXANDER BRYMER.**

Where two persons, who had entered into certain contracts with the victualling-office, agreed to dissolve partnership, and executed a deed, whereby one agreed to resign to the other all his interest in those contracts, all debts due to the concern, and all his share of the partnership property, and the other agreed to pay him 50,000*l.*, at which sum his share and interest was valued: Held, that this was not a sale of property within the meaning of the 49 G. 3. c. 149, and did not require an ad valorem stamp.

COVENANT. The declaration stated that *Alexander Brymer*, in his lifetime, was executor of *James Brymer*, who, in his lifetime, made an indenture between himself of the one part, and plaintiff of the other part, whereby, after reciting that the plaintiff and *James Brymer* in May 1813 had entered into certain contracts with the commissioners for victualling His Majesty's navy, and that they, about the 17th of September 1813, mutually agreed to dissolve and determine the co-partnership so entered into for carrying on the business of the said contracts, &c., and that it was agreed that the share and interest of the said *James Brymer* of and in the monies, property, and effects belonging to the said co-partnership, or to them the said parties on account thereof, should be estimated at the sum of 50,000*l.*, and be taken by the plaintiff at that sum, and that the plaintiff should thenceforth have the full benefit of the said recited contracts, and carry on the business thereof on his own account, and for his own exclusive use, &c.; and that the plaintiff had paid to *James Brymer* 30,000*l.* in part of the said sum of 50,000*l.*, the value of his share of the said partnership property, monies, and effects, and for securing the payment of 20,000*l.* residue of the sum of 50,000*l.* had accepted bills, &c.; in pursuance of the said recited agreement the said plaintiff and *James Brymer* did dissolve partnership in the said contracts, and the said *James Brymer*, in consideration of

of all and singular the premises, did bargain, sell, assign, transfer, set over, and confirm unto the plaintiff all the share and interest of him the said *James Brymer* of, in, and to all and singular the debts, sum and sums of money whatsoever, then due and owing to them the said plaintiff and *James Brymer*, under or by virtue of or in consequence of the same several contracts or otherwise; and all bonds, bills, and notes relating to the said contracts, debts, and sums of money, or any of them, or any part thereof; and of and in all and singular other the monies, goods, chattels, stock, and effects whatsoever and wheresoever then of or belonging to them the said Plaintiff and *James Brymer*, as such co-partners respectively, and all the right, title, and interest, property, claim, and demand whatsoever of him the said *James Brymer*, of, in, to, from, out, or in respect of the premises; habendum to the plaintiff as and for his own proper monies and effects absolutely. The declaration then set out certain covenants and breaches; pleas, non est factum, and certain special pleas not material to the question discussed before the Court. At the trial before Abbott C. J. at the London sittings, after last *Trinity* term, the deed set out in the declaration was produced in evidence, and was found to have a common deed stamp only. For the defendants, it was objected, that it should have had an ad valorem stamp upon the 50,000*l.*, the consideration paid by the plaintiff for *James Brymer's* share of the partnership property, which, according to the 48 G. 3. c. 149. (the stamp act in force when the deed was executed) would have been 500*l.* The Lord Chief Justice thought the objection valid, and directed a nonsuit. In *Michaelmas* term a rule nisi for setting aside the nonsuit was obtained, against which

1827.
Belcher
against
Sme.

1827.

~~Bullock
against
Saxton.~~

Dennan, Brodrick, and Manning shewed cause. The rule for setting aside the nonsuit in this case was granted upon the authority of *Lyburn v. Warrington.* (a) But that was a very different case. The consideration was paid merely for the goodwill of a trade, and for the privilege of carrying it on for a certain number of years in a particular house. No property was assigned. In the present case the deed shews that valuable property was assigned, and it states it to have been sold by *James Brymer* to the plaintiff. That is directly within the provision of the 48 G. 3. c. 149., which requires an ad valorem duty to be paid "upon the sale of any lands, tenements, rents, annuities, or other property, real or personal, heritable or moveable, or of any title, right, interest, or claim, unto, out of, or upon, any lands, tenements, rents, annuities, or other property."

The Solicitor-General, Scarlett, Marryat, and J. Evans, contrà. First, this was not a sale; secondly, it was not a sale of property within the meaning of the act. Looking at the whole of the deed, it appears to have been merely a settlement of accounts between the two partners. Suppose it had been agreed that upon the dissolution the plaintiff should receive and realize all the outstanding debts and property, and pay over half the proceeds to the retiring partner, there would have been no pretence for calling that a sale; and in substance that was the nature of the transaction in question. It was merely a calculation that the outgoing partner would be entitled to 50,000*l.*, and an agreement to pay that sum at once, in order to avoid the inconvenience of making

(a) 1 Stark. N. P. C. 162.

payments

payments from time to time as funds were received. Secondly, this was not a sale of *property* within the meaning of the statute, according to the construction put upon that word in *Warren v. Howe* (a), and *Denn d. Manifold v. Diamond* (b), [*Bayley J.* There the assignor got nothing.] *Coates v. Perry* (c), and *Lyburn v. War-rington*, are also strong authorities for the plaintiff in this case.

1827.

 BELCHER
against
SIXES.

ABBOTT C. J. If the case of *Warren v. Howe* was rightly decided, this rule must be made absolute, for, in principle, it cannot be distinguished from this case. As at present advised, we all think that the subject matter of the contract was not *property* within the meaning of the statute; but as the case must go to a new trial, the parties may, if they please, raise the question in such a manner as to obtain a more solemn decision.

Rule absolute.

(a) 2 B. & C. 281.

(b) 4 B. & C. 243.

(c) 3 B. & B. 48.

ADNAM against WILKS, Gent., one, &c.

Friday,
February 9th.

THE plaintiff, in *Trinity* term, 1826, recovered a verdict against the defendant for 220*l.* The defendant brought a writ of error, and on the 16th of *June* gave notice of bail in error having been put in. On the same day the plaintiff excepted to the bail, and took out and served a rule for better bail; and on the 20th of not so justify: Held, that the bail were not entitled to have an exoneretur entered on the bail-piece.

June

Bail in error were put in, in the vacation, and excepted to, and the plaintiffs in error gave notice that they would justify on the first day of the next term; they did

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 ADYAN
 against
 WILKS

June the defendant gave notice that the same bail would, on the first day of *Michaelmas* term, justify or offer themselves for justification. The plaintiff, in the original action, gave a rule to transcribe, and the defendant (the plaintiff in error) did transcribe, after which no proceedings were had upon the writ of error, and the cause was still depending and undetermined. The bail, in this term, obtained a rule, calling upon the plaintiff to shew cause why their names should not be struck out of the recognizance, or why an *exoneretur* should not be entered on the bail-piece.

Hutchinson shewed cause. The bail are not entitled to this indulgence. By the terms of the recognizance they are bound as well for the amount of the verdict in the original action as for costs in error; and even if the plaintiff (as he might have done) had issued execution, there would still be something, the costs of the proceedings in error, for which he would have no security, and for which the bail had, by their recognizance, become liable; besides, they are not entitled to relief from liability, even to the extent of the recognizance; for by entering into the recognizance, and giving notice of justification, they have prevented the plaintiff from having the benefit of his judgment and issuing execution, from the 16th of *June* until after the first day of *Michaelmas* term. *Dickenson v. Heseltine* (*a*) is in point.

Chitty contrà. This case is distinguishable from *Dickenson v. Heseltine*, for there the defendant non-crossed his own writ of error. In *Gould v. Holmstrom* (*b*)

(*a*) 2 M. & S. 210.

(*b*) 7 East, 580.

bail

bail in error who were excepted to and did not justify, were relieved from proceedings against them, though no other bail had been put in ; and the Court said, that the party who takes exception to the bail put in, considers them as no bail, unless they justify ; and, therefore, not having justified, they must be considered as no bail.

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against
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ABBOTT C. J. The bail are not entitled to relief. By the recognizance they incurred a liability, at all events, to the extent of the costs of the proceedings in error. The plaintiff, by issuing execution against the defendant, could not obtain the benefit of those costs. Besides, the bail are not entitled to be relieved on another ground ; for they have delayed the plaintiff, and prevented his issuing execution for a long period. The rule for better bail only excepted to the bail to a certain extent, not altogether ; and they were not at liberty to withdraw themselves.

BAXLEY J. The bail are not entitled to relief. They are liable to pay the costs in error. The exception to them did not amount to an objection to them altogether. The case of *Gould v. Holmstrom* proceeded on the ground that a party who excepts to bail considers them as no bail ; but that is a mistake.

HOLROYD and **LITTLEDALE** Js. concurred.

Rule discharged. (a)

(a) See *Bramwell v. Farmer*, 1 *Taunt.* 427.

1827.

*Friday,
February 9th.*

The KING against SLYTHE.

Where a corporator has attended and voted at a meeting for the election of officers of the borough, he will not be allowed to become relator in quo warranto, and impeach the titles of the persons there elected on account of an objection to the title of the presiding officer, unless he shews that at the time of the election he was ignorant of the objection.

An affidavit to found a motion for quo warranto, is sufficient if it states the defendant's "information and belief," that the party against whom the application is made has exercised the office.

Where a person had an inchoate right to be a free burgess of a borough: Held, that his title could not be impeached, because he was sworn in before officers who were so de facto, but not de jure.

A RULE had been obtained in the last term, calling upon the defendant to shew cause why an information in the nature of quo warranto should not be filed against him for usurping the office of free burgess of the borough of *Ipswich*. The rule was obtained upon an affidavit made by *G. R. Clark* to the following effect. By the governing charter of the borough, there are in *Ipswich* two bailiffs, elected annually on the 8th of *September*, for the good government of the town. The old bailiffs have always presided as returning officers at the court holden on the 8th of *September* for the election of bailiffs and other officers. At a court holden on the 8th of *September* 1824, at which *W. B.* and *J. A.* presided as bailiffs and returning officers, *F. Seckamp* and *C. C. Hammond* were elected bailiffs. In *Easter* term 1825, informations in the nature of quo warranto were filed against *Seckamp* and *Hammond*, and in *Trinity* term 1825 they disclaimed, whereupon judgment of ouster was signed against them. On the 14th of *June* 1825, a mandamus issued, commanding the bailiffs, burgesses, &c. of the borough to assemble on the 21st of *July* then next, and elect bailiffs; and at that meeting *William Batley*, one of the common-councilmen, *W. H.* and *B. B.*, two of the portmen of the corporation, and several other burgesses, &c. were present, and *Seckamp* and *Hammond* were elected bailiffs. *Batley* presided at the meeting, and *Seckamp* and *Hammond* were sworn in before him. By the immemorial custom of the borough, the

the Portmen take precedence of the common-councilmen in all corporate meetings. At the great court, holden September 8. 1825, at which *Seckamp* and *Hammond* presided, they were re-elected bailiffs for the ensuing year. In Michaelmas term 1825, a rule for a quo warranto information against *Seckamp* and *Hammond* was made absolute, but not further proceeded in, and they continued to execute the office of bailiffs for the whole year. At a court holden before them, June 15th, 1826, *Slythe* was admitted and sworn a freeman. The affidavits in answer shewed that the relator, *Clark*, voted at the election of bailiffs in September 1825, when *Seckamp* and *Hammond* presided. On a former day in this term,

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Campbell and *Patteson* shewed cause. The only objection that can be made to *Slythe's* title is, that he was admitted and sworn in before *Seckamp* and *Hammond*, and that they were not legally elected bailiffs of the borough. But the relator, *Clark*, was present and voted at their election; he cannot, therefore, now impeach it either directly or collaterally, by attacking those burgesses who were sworn in before them, *Rex v. Trevenen.*(a)

(They were then stopped by the Court.)

Adam contrà. The rule by which a person who has concurred in an election is afterwards restrained from impeaching it, does not apply to this case. A rule for a quo warranto information has been already made absolute against *Seckamp* and *Hammond*; the present relator does not, therefore, come forward to disturb the peace of the borough, but merely to follow up that

(a) 2 B. & A. 339.

which

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against
SUTHER.

which has been done by the Court. It does not appear that he knew of any objection to *Seckamp* and *Hammond* at the time of the election of bailiffs in *September 1825*.

A similar rule had been obtained against *Lane* and *Cobbold*, the bailiffs of the borough elected at a great court holden *September* the 8th, 1826, when *Seckamp* and *Hammond* presided. In this case one *Monk* was the relator, and the objection to *Lane* and *Cobbold* being, that *Seckamp* and *Hammond* were not good presiding officers, and it appearing that he had concurred in their election in *September 1825*, the Court called upon

The *Solicitor-General* and *Alderson* to support the rule. The objection to the title of *Seckamp* and *Hammond* arose at the election in *July 1825*, when they were elected at a meeting holden in pursuance of the mandamus from this Court. *Batley*, a common-councilman, presided at that meeting, and he had not power to preside there as returning officer. Now it does not appear that *Monk*, the relator, was present at the mandamus election, or that when he concurred in the subsequent election, he knew of the objection which existed to *Seckamp* and *Hammond*, and therefore, according to *Rex v. Morris* (a), his concurrence in that election does not now preclude him from becoming a relator.

ABBOTT C.J. It has been generally considered a rule of corporation law, that a person is not to be permitted to impeach a title conferred by an election in which he

(a) *3 East*, 215.

has

has concurred, or the titles of those mediately or immediately derived from that election. In the cases of *Rex v. Trevenen* and *Rex v. Morris*, some attention appears to have been paid to the question whether the party coming forward as a relator were or were not conusant of the circumstances of the case at the time when he concurred in the former election. But it seems to me that to allow an inquiry, in every instance, into the relator's knowledge or ignorance of every particular fact, would lead to much intricacy and confusion. I think that every corporator must be presumed to be conusant of that which has recently taken place in the corporation of which he is a member, unless he shows the contrary. The relator in each of these cases concurred in the last election of *Seckamp* and *Hammond*; and the question is, whether we shall allow them in this indirect mode to bring the validity of that election before us. It is said, that they did not concur in the prior election. Peradventure they might not; but until the contrary is shewn, it must be presumed that they were conusant of the circumstances under which it took place. For these reasons, I think that the present applications cannot be received. But in order to prevent any misunderstanding upon this point, I will add, that if a person should concur in an election in ignorance of some fact making it invalid, and should afterwards come before the Court and shew the objection, and that it has come to his knowledge since the election, and that it is a matter which ought to be inquired into, I would by no means have it inferred from the decision in the present case that such an application ought not to be heard.

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LITTLEDALE J. concurred. (a)

Rule discharged.

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Upon these rules being discharged, others of the like nature were obtained against the same parties, at the relation of persons to whom there was no objection; but upon cause being shewn on this day, it was said, that the affidavits were not sufficient, because they did not state positively that the defendants exercised the offices from which it was proposed to remove them, but that the *ponents had been informed and believed* that they exercised those offices.

The Court, upon the authority of *Rex v. Harwood* (b), held that these affidavits, uncontradicted, were sufficient, observing, that it made a great difference whether the matter of hearsay and belief went to the validity of the title, or merely to the fact of the party having exercised the office; and the rule, as to *Lane* and *Cobbold*, the bailiffs, was made absolute.

In the case of *Rex v. Slythe*, a free burgess, an affidavit was made showing that *Slythe* had by birth an inchoate right to be admitted at the time when he took the oaths, and was admitted before *Seckamp* and *Hammond*.

Campbell and *Patteson* shewed cause. The persons before whom *Slythe* was admitted and sworn were bailiffs *de facto*, and that is sufficient to make his title perfect. There is not any instance where a defect of title in the

(a) *Bayley* J. had left the court, and *Holroyd* J. was absent from indisposition.

(b) 2 *East*, 177.

presiding

presiding officer has been considered a sufficient ground for setting aside the admission of a freeman; and the question ought not to be raised, for it would probably affect the titles of many hundreds of burgesses in different corporations. The act of administering the oaths to the defendant was not voluntary on the part of the bailiffs; in doing that they were merely ministerial officers, and upon an application to this Court by *Slythe*, shewing an inchoate right, a mandamus to compel them to administer the oaths and admit him would have been granted, without any inquiry as to whether they were bailiffs de jure or de facto only. In *Rex v. Corporation of Shrewsbury* (a), it was admitted that acts which officers are compellable to do are valid when done by officers de facto. Admittance to the office of a free burgess is analogous to admittance to a copyhold estate, and that may be done by a lord of the manor in by disseisin. (b) Again, a mayor de facto may bind the corporation by concurring in putting the common seal to a bond, *Knight v. Corporation of Wells*. (c) So also he may return members to parliament, may hold sessions, and perform judicial acts; a fortiori, therefore, he may admit and swear in a freeman, which is a ministerial act.

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against
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Adam and *Alderson*, contra. The magnitude and importance of the question, which are urged on the other side as an answer to this application, ought to induce the Court to make the rule absolute. It is said that because the Court would grant a mandamus to compel the admittance of a person having an inchoate right to the office of free burgess, leave to file an information in

(a) *Cas. temp. Hardw.* 150. (b) *4 Co. 24 b.* (c) *1 Lutw.* 519.

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the nature of a quo warranto ought not to be granted; but in either case the Court acts upon colourable grounds, and where a mandamus issues, all questions of law are open to discussion upon the return. Besides, when an application is made for a mandamus, of course no objection is made to the title of the persons who are directed to obey it, and they themselves cannot raise any such objection. It has been assumed, that admitting free burgesses is merely a ministerial act, and may therefore be performed by bailiffs *de facto*; but it is their duty to inquire into and judge of the title of the party applying to be admitted. [*Bayley J.* You do not affect to impeach *Slythe's* original title.] It is not at all adverted to, and cannot affect the general question.

ABBOTT C. J. I am of opinion that this rule must be discharged. The application was made upon this ground only, that the party was admitted to his office of free burgess at a corporate meeting holden before bailiffs, who were not good presiding officers. That is *prima facie* a valid objection; but the answer made to it is, that the defendant had an inchoate right to be admitted. I take it to be clear, that where a title has been conferred, that is defeated by showing that the party conferring it had no right to do so. But the title in question was not conferred by the presiding officers; their duty was merely to inquire into the fact of the existence of the alleged inchoate right. If any doubt as to the propriety of the admittance had been suggested, the case would be different, for then there would be a question of right to be determined. But where we find a person having a clear inchoate right, and going to a corporate meeting to claim his admittance as a free burgess, can we say that

that his admittance was bad on account of a defect in the title of the officers presiding at that meeting? If the objection were good, I should expect to find that it has been heretofore raised, but there is no case to support it. It is argued, that if there be any doubt, we ought to put the question in a course of trial. We are not, however, left without any discretion in such cases, and we are at liberty to consider the consequences of suffering the question to be agitated. If this rule were made absolute, we might be called upon in the very next term to grant hundreds of the same description, to the disturbance of almost every corporation in the kingdom. This consideration might suffice to make us discharge the rule, even if some slight doubt existed, but no such doubt exists in my mind, and I think that we ought not to sanction any further discussion of the question.

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against
SLYTHE.

Rule discharged.

The KING against EVETT.

A N inquisition removed into this Court was in the following words: "Inquisition taken at Wolverton in the county of Bucks, on, &c., before James Burnham, one of the coroners for the said county, on view of the body of Elizabeth Baldwin, an infant then and there lying dead, upon the oath of the several persons under

quisation, and it was subscribed by them with the initials only of their Christian names: Held, that these were defects in substance, and could not be amended, and the inquisition was quashed.

The inquisition found that the death was occasioned by a coach and horses, the property of A. and B. and Co.: Held, that this finding could not be altered upon affidavits that the property was in A. and B. alone.

A coroner's inquest omitted to state the place where the death happened, or where the body was found; the names of the jurors were not inserted in the body of the in-

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against
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written, and whose seals are affixed, who, being duly sworn, say, that the said *Elizabeth Baldwin*, on, &c., at the parish, and in the county aforesaid, being crossing the King's highway in the said parish, it so happened, accidentally, casually, and by misfortune, the said *Elizabeth Baldwin*, in the attempt to cross such road, was suddenly forced to and against the ground by the leaders of a certain coach called the *Tally Ho*, which was passing through such parish, by means whereof she was so much bruised and otherwise injured as to occasion her death, as to languish for the space of fifty-seven hours, and then died. And so the jurors aforesaid, upon their oath do say and present that *Elizabeth Baldwin* in manner and by the means aforesaid came to her death, and not otherwise, and that the said coach and horses were moving to the death of her, the said *Elizabeth Baldwin*, and are of the value of 80*l.*, the property, and in possession of *Humphrey Evett, William Gilbert, and Company.*" This inquisition was signed and sealed by the coroner and jurors, but many of them signed the initials only of their Christian names. A venire having been issued against defendant *Evett*, he appeared and demurred to the inquisition.

Campbell in support of the demurrer contended that the inquisition was bad, inasmuch as it did not state when the death happened, nor where the body was found. That the names of the jurors ought to have been inserted in the body of the inquisition, and also that the jurors ought to have affixed their Christian names at full length, and not merely the initials. That the cause of the death was stated with great uncertainty, there being nothing to explain what was meant by "the leaders" —
t —

the coach," nor any averment that at the time when the accident happened they were attached to and drawing the coach.

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Chitty, contra, contended that the Court must presume that the death happened, or that the body was found at the place where the inquisition was holden; and that the other objections were merely of form, and, therefore, not grounds of general demurrer.

The Court did not give any judgment; but their opinion appearing to be against the inquisition,

Chitty afterwards obtained a rule nisi for a *venire facias* to bring the coroner into court in order that he might amend the inquisition by inserting the place where the death of *Elizabeth Baldwin* happened, and also the Christian names of the jurors, and to amend the statement as to the ownership of the coach and horses by striking out the words "and Company," so as to make it a finding of property in *Evett* and *Gilbert* only. The motion was founded upon an affidavit made by the coroner, setting out the names of the jurors at length, and averring that they were the same persons who signed the inquisition, and before whom it was taken, and also that the coach and horses were the property of *Evett* and *Gilbert*, and that he, believing them to be in partnership, had on that account added the words "and Company."

Campbell shewed cause. The only object to be gained by the proposed amendments is, the power of enforcing the payment of a deodand, and not the advancement of justice, for which alone amendments are in general allowed.

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against
EVERT.

lowed. In *Com. Dig.* tit. *Officer* (G 12.), it is laid down, that "if an inquisition finds the substance, though defective in form, it may be amended." And all the cases cited are instances of amendments in matter of form; *Rex v. Saloway* (*a*), *Rex v. Glover*. (*b*) Here, the Court are asked to allow amendments in substance. [He was then stopped by the Court.]

Chitty contrà. This motion was founded upon the affidavit of the coroner, and amendments of the same nature as those now proposed have heretofore been made in the Crown-office. [Abbott C.J. The statement of ownership of the coach and horses is the finding of the jury. How can the Court, or the coroner by their order, alter that?] An instance of such an amendment has occurred. (*c*) [Abbott C.J. We do not know upon what affidavit that was done.] In *Rolle's Abr. Amendment* (B), several instances are put in which a sheriff has amended the names of jurors in the panel after verdict; and in *Rex v. Harrison* (*d*) it is said that an inquest may be amended in all points except the matter of the verdict.

Per Curiam. This inquisition does not state where the death happened, nor where the body was found. It

(*a*) 3 Mod. 101.

(*b*) 1 Sid. 259.

(*c*) A record of an inquisition in *Rex v. Williams and Bellamy*, *E. T.* 15 G. 3. was produced by the officer of the Crown-office, by which it appeared that the death was occasioned by a fall from a cart, which was originally found to be the property of "Messrs. Williams and Company, of Stratford, in the county of Essex, calico printers;" and by an order of Yates J., on hearing the clerks in court on both sides, this was altered to "Stephen Williams and Clement Bellamy, of the Poultry, London, linendrapers." A venire then issued to bring in the defendants to answer for the deodand, and the proceedings were afterwards stayed upon payment of the deodand and costs.

(*d*) 1 Sid. 225.

does

does not in the body of it state the names of the jurors, **nor** are their Christian names subscribed to it. Now it **is** essential to state the place of the death and the finding of the body, in order to originate the jurisdiction of the coroner; and we should go beyond all former cases **were** we to allow these amendments. The purposes of justice do not appear to make this requisite, and for those purposes alone amendments are in general allowed. But we are moreover asked to alter the finding of the jury as to the ownership of the coach and horses. If this were a bill found at the assizes by a grand jury, in which the Court have power to alter matters of form, but not of substance, such an alteration could not be made; neither can it in this inquisition. The rule must therefore be discharged.

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against
Everett

Rule discharged; and upon

Campbell's motion, the inquisition was quashed for the defects before mentioned.

FAR EWELL, Administratrix, against DICKENSON.

THIS was an action of debt for rent, tried before **Bayley** J. at the last sittings in this term for **Westminster**. The declaration alleged a demise of "a messuage land and premises with the appurtenances." The plaintiff, for the purpose of proving the amount of rent due, put in evidence an agreement dated the 20th of ~~January, utensils, and implements:~~ Held, that as the rent issued out of the real property, ~~and~~ ~~not out of the furniture,~~ it was sufficient for the plaintiff to allege and prove a demise of the real property, and therefore there was no variance.

Declaration in
debt for rent
stated a demise
of a messuage,
land, and pre-
mises, with the
appurtenances.
The proof was
of a demise of
a messuage
and land, toge-
ther with the

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 FAREWELL
 against
 DICKENSON.

September 1825 between J. M. Farewell, the late husband of the plaintiff, and the defendant which described the property demised as being “a messuage or tenement, stable, and outbuildings, with the cottage, garden land, and appurtenances belonging thereto, together with the furniture, utensils, and implements.” The learned Judge considering the agreement as an entire contract for the rent of the house, &c., with the furniture, &c., held the variance fatal, and nonsuited the plaintiff, but gave him leave to apply to the Court to set aside the nonsuit, and enter a verdict for 120*l.* A rule nisi for that purpose was obtained by *Rowe*, who relied on *Spencer’s case (a)*, *Emott v. Cole (b)*, *Newman v. Anderton (c)*, *Walsh v. Pemberton (d)*, to shew that no portion of the rent issued out of the furniture, but that the whole issued out of the land, and therefore the demise was well laid as a demise of the house, &c.

Chitty shewed cause on the last day of the term.

Rowe was stopped by the Court.

Per Curiam. It appeared that the furniture was one of the things demised. But in point of law the rent issued out of the real property, and not out of the furniture. It was sufficient, therefore, for the plaintiff to allege and prove a demise of the real property out of which the rent claimed issued, and the rule for entering a verdict for the plaintiff must be made absolute.

Rule absolute.

(a) 5 Co. 17.

(c) 2 New Rep. 224.

(b) Cro. Eliz. 255.

(d) Selw. N. P. 6th edit. 616.

1827.

CHECCHI et Ux. against POWELL and Others.Monday,
February 12th.

A RULE having been obtained for judgment as in
case of nonsuit in this case,

Oldnall Russell shewed cause upon an affidavit that the wife of *Checchi* died after notice of trial was given. By the death of the wife this action, which was for money lent by the wife before her marriage, is at an end. The husband cannot claim the wife's choses in action unless he reduces them into possession during her life; after her death they go to her personal representative. In *Co. Lit.* 351 b. it is laid down, that "the marriage is an absolute gift of all chattels personal of the wife in possession in her own right, whether the husband survive the wife or no; but if they be in action, as debts by obligation, contract, or otherwise, the husband shall not have them, unless he and his wife recover them." *Beamond v. Long* (a) shews that the property is not altered by the bringing an action, unless judgment is obtained before the death of the wife.

Where husband and wife commenced an action for money lent by the wife before marriage, and she died pending the action: Held, that it thereby abated, and that defendant could not afterwards have judgment as in case of nonsuit.

Halcomb contra. The husband may during his wife's life release or assign her chose in action, or it will pass to his assignees in case of bankruptcy, but a technical rule requires that her name should be used in bringing an action. Here the action was properly commenced, and the husband did all in his power to reduce the alleged

(a) *Cro. Car.* 227.

debt

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CHURCH
against
POWELL.

debt into possession. The Court will, therefore, allow him to suggest on the record the death of his wife, for he is at all events entitled to recover the money if it was due to his wife, for by the stat. 29 Car. 2. c. 3. s. 25. he is entitled to letters of administration.

ABBOTT C. J. This Court has not any question before it respecting an equitable assignment of the wife's chose in action, or the operation of the bankrupt laws. The doctrine laid down in *Co. Lit.* 351 b. has always been received as law in *Westminster Hall*. Here, then, the debt was never vested in the husband, there being no recovery in the wife's lifetime. He may have another claim as her personal representative, but this action is at an end. The rule must, therefore, be discharged.

Rule discharged.

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ELIZABETH BIDDELL, Widow, (she and one JOHN COXE, since deceased, being sued as Executrix and Executor of THOMAS BIDDELL, deceased)
against MARY DOWSE.

(In Error.)

THIS was a writ of error upon a judgment of the Court of Common Pleas, in an action for breach by the defendants below, of a promise to pay a sum of money awarded by an arbitrator. The first count of the declaration stated, that before the making of the promise and undertaking of the defendants as thereinafter mentioned, certain differences had arisen, and a certain suit was then depending in the High Court of Chancery, in which the said plaintiff, *Mary Dowse, widow, J. Lightfoot Wilkinson, and Mary his wife, Jane Dowse Wilkinson, G. Wilkinson, Mary Ann Wilkinson, J. T. Wilkinson, John Dowse Wilkinson, E. Wilkinson, and L. H. Wilkinson, infants, by the said J. L. Wilkinson*, their father and next friend; and *W. Jones and Elizabeth, his wife, E. Jones, M. W. Jones, J. T. W. Jones, W. E. J. Jones, and J. D. Jones, infants, by the said W. Jones, their father and next friend; James May and Susan his wife, J. May the younger, E. T. May, and*

~~and the infants, and P. K. and T. B. since deceased, should be referred to the arbitrament of C., who was to make one or more awards, and in case either of the parties died, the death was not to abate the reference; that T. B. afterwards died, before the making of the award; that the arbitrator awarded that the defendants, as executor and executrix of T. B., should pay to the said plaintiff 225*l.* out of T. B.'s assets, and that being so liable as aforesaid, the defendants, executor and executrix as aforesaid, promised to pay: Held, upon error, that no sufficient authority to refer on behalf of the infant plaintiff was shewn, the attorney in the suit having no such authority, and that therefore the submission was not mutual, and, consequently, the award was bad.~~

M. May,

Declaration stated, that before the making of the promise therein mentioned, certain differences had arisen, and a certain suit was depending in Chancery between *M. D.* and divers infants, plaintiffs, and *P. K.*, *T. B.* since deceased, and *J. R.*, defendants; and it was ordered, with the consent of the attorneys of the parties in the said suit, that the several matters in question in the said suit, and all disputes and differences then subsisting between the said plaintiff, *M. D.*,

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M. May, infants, by the said *J. May*, their father and next friend; and *T. May* and *J. Boxer* were plaintiffs: and *Peter King*, *Thomas Biddell*, since deceased, and *J. Reay*, were defendants. And that by an order of Sir *John Leach*, Vice-Chancellor, bearing date the 14th of June 1823, it was amongst other things ordered, with the consent of the attorneys of the parties *in the said suit*, that the several matters in question in the suit, and all disputes and differences then subsisting between the said plaintiff, *Mary Dowse*, *J. Lightfoot Wilkinson*, and *Mary* his wife, *William Jones* and *Elizabeth* his wife, and *James May* and *Susannah* his wife, and *Peter King* and *Thomas Biddell*, since deceased, should be referred to the award, arbitrament, final end, and determination of *W. C.* who was to be at liberty to make one or more award or awards of and concerning the matters thereby referred to him, as he should think fit; so as such award or awards should be made in writing under the hand and seal of the said *W. C.*, ready to be delivered to the said parties, or such of them as should require the same, on or before the 23d day of *June* then next, or on or before such ulterior day or days as the said *W. C.* should from time to time appoint in writing, by indorsement upon the said order. And in case either of the said parties should happen to die before the making of the final award under the said reference, the reference was not to abate, but the executors and administrators of the parties so dying were to be considered and taken as parties to the order, in like manner as their testator or intestate. The declaration then stated, that before the making of the award thereinafter mentioned, to wit, on the 28th of June 1824, the said *Thomas Biddell* died, to wit, at, &c.; that the arbitrator enlarged the time for making his award,

award, until the last day of *Trinity* term 1824, and that he during the enlarged time for making his award, to wit, on the 7th *July* 1824, at, &c., made his award in writing between the parties aforesaid, of and concerning the said differences; and did thereby then and there (amongst other things) award that the defendants, as executor and executrix of *Thomas Biddell* deceased, should, out of the assets of *Thomas Biddell*, on the 27th day of *July* then next, between the hours of eleven and twelve in the forenoon, at the chambers of Mr. *J. Boxer*, of *Furnival's Inn*, in the county of *Middlesex*, pay to the plaintiff the sum of 225*l.*, of which award the defendants, executor and executrix as aforesaid, afterwards, to wit, on the said 7th day of *July*, in the year last aforesaid, had notice, to wit, &c.; by reason of which said premises the defendants, as executor and executrix as aforesaid, became liable to pay to the plaintiff the said sum of 225*l.* according to the tenor of the award, to wit, at, &c.; and being so liable they the defendants executor and executrix as aforesaid afterwards, to wit, on, &c. at, &c. in consideration thereof, undertook and faithfully promised the plaintiff to pay to her the said sum of 225*l.* at the time and in manner as in the award was directed. Averment, that though the defendants, executor and executrix as aforesaid, to wit, on the 27th *July* in the year last aforesaid, were requested to pay the said sum of 225*l.* to the plaintiff, according to the tenor and effect of the award, yet the defendants, executor and executrix as aforesaid, not regarding their promise and undertaking, did not nor would when so requested, nor at any time before or since, pay the said sum of 225*l.* or any part thereof to the plaintiff, but wholly neglected and refused so to do, to wit, at, &c. To this count there was

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a de-

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a demurrer, upon which the Court of Common Pleas gave judgment for the plaintiff.

Campbell for the plaintiff in error. First, the order of the Vice-Chancellor could not have been made the foundation of an action at law, even in the lifetime of *Biddell*. No action is maintainable upon an order of court; it can only be enforced by attachment. An action will not lie on a final decree of a court of equity, unless it be for a sum which would be a debt at law, *Carpenter v. Thornton*. (a) Here the declaration does not disclose any legal debt; it merely recites, that there was a suit in equity between parties, of whom some were married women and others infants. There is nothing to shew that the object of the suit was to recover that which would be a debt at law. Secondly, neither the infants nor married women are bound by the submission, and therefore there is no reciprocity. Suppose the award had been that a sum of money should be paid by the married women, no action could have been maintained against them. It is clear, that unless the submission be mutual the award is void. (b) It was said in the court below that it must be assumed that a court of equity would take care of the interests of the infants and married women; but a court of law cannot take notice of that. Besides, in *Carendish v. _____* (c), where an arbitrator awarded 450*l.* to an infant, and that bond should be given by the guardian that the infant should at his full age convey the land in question, the Lord Chancellor refused to enforce this award, and said that he would never decree an award which would bind an infant. Supposing, however, that an action might have been maintained on an award made in the lifetime of all

(a) 5 B. & A. 52.

(b) 2 Saund. 61. n. 2.

(c) 1 Ch. Ca. 279.

the

the parties, still the death of one was a revocation of the authority of the arbitrator. This action is founded on the award, not on a promise of the testator that his executor should perform the award. Now, a submission to an arbitrator is revocable by the law of *England*; *Vynior's case* (a), *Rolle's Abr. Authority* (D); and that is so even where the authority is created by a rule of court; *Milne v. Gratrix* (b). The death of either of the parties to the submission is a revocation of the authority of an arbitrator, even where a verdict is taken for the plaintiff, and the submission is by order of *Nisi Prius*: *Potts v. Ward* (c), *Toussaint v. Hartop* (d), *Cooper v. Johnson*. (e) This being the general rule of law, the question is, what is the effect of the clause in the submission by which the parties agreed that the reference should not abate by death, but that the personal representatives should be considered parties to the order. Such a provision is inconsistent with the nature of a submission to arbitration, which is revocable and revoked by the death of either of the parties to the submission, and, consequently, an executor cannot be bound by an award made after the death of his testator. A submission to an arbitrator is analogous to a power of attorney, which is revocable and revoked by the death of the party making it. In *Co. Litt. s. 66.* it is laid down, "If a man maketh a deed of feoffment to another, and a letter of attorney to some to deliver to him seisin by force of the same deed; yet if livery of seisin be not executed in the life of him who made the deed, this availeth nothing;" and in *Co. Litt. 52.b.* it is laid down that "a letter of attorney to deliver livery of seisin after the decease of the feoffor is

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(a) 8 Co. 162.

(b) 7 East, 608.

(c) 1 Marsh. 366.

(d) 7 Taunt. 571.

(e) 2 B. & A. 394.

void."

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void." It is true that in *Roby v. Twelves* (*a*) a custom for a copyholder to make a writing in the nature of a letter of attorney to two copyholders of the manor to surrender his copyhold after his death, was held to be good; but that custom was equivalent to a law. In *Rolle's Abr. Feoffment*, s. 1. it is said, "if a man makes a deed of feoffment, with a letter of attorney to J.S. to deliver seisin after his death, the attorney cannot deliver seisin during his life; and if he does, he is a disseisor; nor can he deliver seisin after his death. But if mayor and commonalty or dean and chapter make a feoffment and letter of attorney to deliver seisin, this authority does not determine by the death of mayor or dean," *Bacon's Abr.* tit. *Authority* (E). These passages shew that such an authority cannot be made irrevocable. In *Watson v. King* (*b*) it was held that a power of attorney, coupled with an interest, was instantly revoked by the death of the grantor; and that an act afterwards bona fide done under it by the grantee, before notice of the death of the grantor, was a nullity. So payment to an attorney after the death of the principal, without authority, has been held to be no discharge, *Murray v. The East India Company*. (*c*) Where, indeed, a verdict is taken for a specific sum, subject to the award of an arbitrator, and words are introduced into the order of reference to make the award binding on the personal representative, the award is good, *Tyler v. Jones* (*d*); but there the sum awarded by the arbitrator is considered as if it had been originally awarded by the jury, *Lee v. Lingard* (*e*), *Borrowdale v. Hitchener*. (*f*) In this case there was no verdict. The right of the plaintiff below

(*a*) *Styles*, 425.(*b*) 4 *Camp.* 272.(*c*) 5 *B. & A.* 204.(*d*) 5 *B. & C.* 144.(*e*) 1 *East*, 401.(*f*) 5 *B. & P.* 244.

rests

rests entirely on the award; and unless there was an instrument binding all the parties to submit to an award made after the death of the testator, it is void. The marriage of a woman is a revocation of a submission made by her when sole, *Anon. (a)*, *White v. Gifford (b)*, *Charnley v. Winstanley. (c)* Now suppose that a single woman were to agree that her marriage should not operate as a revocation of a submission, an award made after her marriage would not bind her husband; or if he were afterwards to die it would not bind the wife. The husband, if living, or the wife (if he died) might be sued for revoking the authority, but not for non-performance of the award. *Powell v. Graham (d)*, will be relied upon on the other side; but there the contract was irrevocable in its nature, and therefore binding on the representatives, for it was a promise upon good consideration by a testator that his executors should pay. Then as to the declaration. Here the promise is not alleged to have been made by the defendant as executrix. The promise alleged is a personal promise by the defendant, and no consideration for it is stated. There is no allegation of assets. Now a promise by an administratrix to pay the debt of the intestate if there be no assets, is nudum pactum, *Pearson v. Henry. (e)* Besides, the promise is to pay in manner directed by the award, viz. out of the assets. An averment of assets was, therefore, essential. This form of declaration would deprive a defendant of the opportunity of pleading plenè administravit, *Brigden*

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(a) *Sir W. Jones*, 388.(b) *Roll. Abr.* authority (E), pl. 4.(c) *5 East*, 266.(d) *7 Taunt.* 580.(e) *5 T. R.* 6.

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v. Parkes (a), *Henshall v. Roberts*. (b) It is not even alleged, that *Biddell* lived until the arbitrator took upon himself the burden of the arbitration, or that the executor ever knew of the submission.

Holt contra. It may be conceded that no action at law would be maintainable upon the order of the Vice-Chancellor taken per se. But the parties have adopted the order, and thereby have made the submission their agreement, and this action is founded on that agreement. Then the question is, whether there has been any sufficient consent of the parties. The submission is stated to have been made with the consent of the attorneys in the suit. Now an attorney has authority to refer to arbitration a cause in which he is engaged, *Filmer v. Delber*. (c) So a consignee of goods has authority to refer matters in difference between his principal and a third party, relating to the goods consigned to him. *Curtis v. Barclay*. (d) A solicitor in equity has a more extensive authority than an attorney in an action at law, and he may clearly refer the suit. But, at all events, the submission is not void, but voidable only, at the election of the infants when they attain their full age. That being so, an action might have been maintained against *Biddell* if the award had been made in his lifetime. Then as to the revocation, it is true that either party to a submission may, by an act done by him, revoke the authority of the arbitrator, and that the death of either by law operates as a revocation. But it is competent to the parties to agree not to revoke

(a) 2 B. & P. 424.
(c) 3 Taunt. 486.

(b) 5 East, 150.
(d) 5 B. & C. 141.

by

by their own act, or that the death of either of them shall not operate as a revocation of the authority. Here the testator agreed that his death should not operate as a revocation of the authority of the arbitrator, and his executors are bound by that agreement. Then as to there being no averment of assets, that was a fact within the knowledge of the executors, and they ought to have shewn the want of assets.

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Cur. adv. vult.

ABBOTT C. J. now delivered the judgment of the Court.

The action against the plaintiff in error was brought in the court below on an alleged promise to pay a sum of money awarded, the consideration for the promise being an assumed legal obligation to make such payment according to an award. Nothing appears to shew a legal obligation arising after the award to pay the money in pursuance of the award, unless there had existed previously, and before the award, a legal obligation to abide by and perform it when it should be made. Such a legal obligation subjecting a party to an action for non-performance, must arise out of some valid and competent submission to the authority of the arbitrator. It therefore becomes necessary to consider, whether, upon the facts set forth in the declaration, there appears to have been such a valid and competent submission. The submission mentioned in the declaration is an order of the Vice-chancellor made in a suit pending before him by consent of the attorneys of the parties in the suit. It is not alleged that the testator assented to the reference, or that he or his executors had any knowledge of it before the award

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was made. The order of the Vice-Chancellor cannot be enforced by action. This was admitted. Then was the consent of the attorneys of the parties to the suit, without more, a valid and competent submission? In order to answer this question, it is proper to observe who were parties to the suit, and what were the matters submitted. Of the parties to the suit, some of the plaintiffs therein appear to have been adults *sui juris*, others married women joined with their husbands, and others infants suing by their next friends. The defendants were all adults. The matters submitted, are the several matters in question in the suit, and all disputes and differences between the adult plaintiffs, including the husbands and their wives, and the defendants in the suit. The matters in question in the suit must be taken to include the interest of the infant plaintiffs. Now, if an action had been brought, and a declaration framed, not upon the award, as has been done, but upon the submission to the award, it would have been necessary to allege a promise to perform the award, and to have shewn also a consideration for that promise, which must have been a promise or some other binding matter on the other side. Admitting for the sake of argument, *but no further*, that the consent of the attorneys of such of the parties in the suit as were adult might be binding upon them, and equivalent to or evidence of a promise on their part to submit to and perform the award, and that this might have been a consideration sufficient to support the promise of the other parties to the suit, as far as regards the interest of the adult plaintiffs, how does it appear that any such consent was given, or promise made by or on behalf of the infant plaintiffs? The only consent shewn in the declaration, is the conser-

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of the attorneys of the parties in the suit; but the infants cannot have had an attorney either in or out of the suit, and, therefore, no person representing them is alleged to have consented to the reference. And if, by the attorneys of the parties in the suit, we are to understand the attorneys of the next friends of the infants, can it be inferred merely from that character of attorneys, that they had authority to bind their principals, the next friends of the infants, to answer and become personally bound for the infants' acquiescence under and performance of the award, and to be responsible if they should refuse to do so when they came of age, and should choose to open and reagitate the matter.

If we were to do this, we should impose upon the next friend of an infant an obligation far different from that which he takes upon himself when he consents to be named as next friend for the purpose of a suit.

We therefore think the Court cannot do this by inference only, as by the frame of the present declaration the Court is required to do. If in fact the next friends of the infants did take this obligation upon themselves, that matter ought to have been specially averred and shewn. Nothing of that kind is shewn, but the case is left to rest entirely on the consent of the attorneys of the parties in the suit. There is a report of a case in the Court of Chancery very much resembling the present. (a) It was shortly noticed at the bar; I shall quote it more at length.

Matters in difference were referred by consent and order of the Court, and an award made. Exceptions were taken to the award on one side, and the other side

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(a) *Trin. term, 28 Car. 2. 1 Cha. Ca. 279.*

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prayed it might be decreed. The Lord Chancellor (*a*) said, "when there is a reference by consent and order of court, if it appear inequitable this Court will not decree it; and accordingly in this cause, set aside the award and bond of submission. The reason was, because it concerned an infant, to whom 450*l.* was awarded, and that bond should be given by the guardian that the infant should, at his full age, convey the lands in question, which is not reasonable; for he may die, or if he live to full age, may refuse to convey. *It is not mutual.*" In like manner, we think the submission in the case now before the Court was not mutual. It is true, that we cannot say whether in fact the interest of the infants is affected by this award; but if the submission fails as to one important part, we think it cannot stand as to the residue. A person may be willing to submit a suit in equity, and all other matters to reference, and yet not willing to submit other matters, and leave the suit to proceed. And upon this ground, without adverting to the other objections that were taken in the argument at the bar, we think the plaintiff below has not shewn a good cause of action, and, consequently, that the judgment must be reversed.

Judgment reversed.

(*a*) Lord Nottingham.

1827.

RULES OF COURT.

Hilary Term, 7 & 8 G. 4. 1827.

Whereas much vexation and expence have been occasioned to defendants in informations in the nature of quo warranto, by the practice of raising issues upon various matters distinct from the ground on which the information was granted by the Court:

Now for providing a remedy in this behalf, it is ordered, that from henceforth the objections intended to be made to the title of the defendant shall be specified in the rule to shew cause, and that no objection, not so specified, shall be raised by the prosecutor on the pleadings, without the special leave of the Court, or of some Judge thereof.

It is ordered, that no officer of the King's Bench prison, or any of the persons employed by the marshal therein, in the management or superintendance of the prison or prisoners, shall either directly or indirectly be concerned in selling any article to, or doing any work for any of the prisoners; and that the marshal shall remove from his place every such officer or person aforesaid who shall be guilty of violating this rule, pursuant to the rule of this Court of *Michaelmas* term, in the 58th year of his late majesty.

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CORBETT *against* PACKINGTON, Bart. (a)

In a declaration on the case, one count stated that plaintiff, at the request of the defendant, had caused to be delivered to him certain boars, pigs, &c., to be taken care of by the defendant for plaintiff, for reward to him, defendant, and in consideration thereof defendant undertook, and then and there agreed with the plaintiff to take care of the boars, &c., and to redeliver the same on request: Held, on motion in arrest of judgment, that this was a count in assumpit, and could not be joined with counts in case.

CASE. The first count of the declaration stated, that the plaintiff at the request of the Defendant had caused to be delivered divers boars and pigs, to be by the defendant safely and securely kept and fed; yet the defendant not regarding his duty whilst he had the said boars, &c. for the purpose aforesaid, to wit, on, &c. conducted himself so carelessly in and about the keeping and feeding of the said boars and pigs, that by and through the mere negligence of the defendant in that behalf, the same were wholly lost to the plaintiff.

Second count. That the plaintiff, at the like instance of the defendant, had caused to be delivered to him divers other boars, &c. to be taken care of by the defendant for the plaintiff, for reward to him the defendant in that behalf, and *in consideration thereof* he, the defendant, undertook, and then and there agreed with the plaintiff to take due and proper care of the last mentioned boars, &c. and to redeliver the same to the plaintiff when the defendant should be thereunto afterwards requested; and although defendant was afterwards, to wit, on, &c. requested by the plaintiff to redeliver the same to the plaintiff; yet the said defendant not regarding his duty in that behalf, did not, when so requested, redeliver them; but, on the con-

(a) Three of the Judges of this court sat, as on former occasions, from Tuesday the 13th to Thursday the 22d of February inclusive; and from Monday the 30th of April to Tuesday the 1st of May inclusive. During that period this and the following cases were argued and determined.

trary,

trary, by and through his carelessness, &c., the last-mentioned boars, &c., became wholly lost to the plaintiff.

Third count in case and count in trover. Plea, not guilty. At the trial before Garrow B. at the last Summer assizes for *Worcestershire* a verdict was found for the plaintiff. In *Michaelmas* term a rule nisi for arresting the judgment on the ground of a misjoinder of the counts was obtained ; against which,

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Peake Serjt. now shewed cause. The first, third, and last counts of the declaration in this case are certainly laid in case, and it will be said that the second discloses a cause of action arising ex contractu, and is therefore improperly joined with the others. But the facts stated in that count raise a duty without any promise, and if that duty has been violated by any wilful act, or by negligence on the part of the defendant, that is a cause of action in tort and not in contract. In *Boson v. Sandford*(a), the declaration (which was in tort) stated that defendants, part owners of a ship, undertook to carry goods for hire, and no objection was made to the form of action, but to the omission of some joint owners. Formerly all cases of this description were considered as lying in tort. If the obligation to take care of the pigs did not arise as a necessary duty, then perhaps this count might be considered as in *assumpsit*. But there is no attempt to charge the defendant with any thing not arising out of the duty imposed by law independent of any promise, and the whole of it is answered by the plea of not guilty, and the same judgment might be given on the whole declaration. The counts may therefore be joined ac-

(a) 2 *Salk.* 440.

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cording to the rule laid down in *Brown v. Dixon* (*a*), which came before the Court on special demurrer. So in *Judin v. Samuel* (*b*), where it was objected on general demurrer, that counts charging that which was properly the subject of an action of assumpsit, could not be joined with a count in trover, it was answered and held by the court, that as the counts were in form in tort, and the same plea might be pleaded to the whole, the objection must fail, and that judgment was afterwards affirmed on error. (*c*) In the present case there is no allegation that the defendant *promised*, and the mere introduction of the word *agreed* into the count in question does not make it assumpsit; for in *Coggs v. Bernard* (*d*) there was the word *undertook*, and yet the count was held good as being in tort. *Orton v. Butler* (*e*) is distinguishable: there the demurrer was to the particular count, and not to the whole declaration for misjoinder; the cause of action was the non-payment of money, which cannot properly be considered as a cause of action ex delicto. In *Govett v. Radnidge* (*f*), that was laid in tort which might have been laid in assumpsit, and yet it was held, that being in tort judgment might be had against one defendant who was found guilty, although the others were acquitted.

Taunton contrà. The case of *Orton v. Butler* is material, not as being a direct authority upon this question, but on account of the opinion solemnly declared by the Court as to the importance of preserving the forms of action provided by the law for particular cases. If they

(*a*) 1 T. R. 274.

(*b*) 1 N. R. 45.

(*c*) 6 East, 535.

(*d*) 2 Ld. Raym. 909.

(*e*) 5 R. & A. 652.

(*f*) 5 East, 62.

are

are to be preserved, the case of *Mountford v. Horton* (*a*) is decisive of the present question; for it was there held, that the word *agreed* imported a promise. That word occurs in the second count of this declaration, and a sufficient consideration for the agreement is shewn; the count is therefore in *assumpsit*, and might have been joined with others adapted expressly to that form of action.

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 COAET
against
PACIFICATOR.

BAYLEY J. It has been properly conceded, that counts in tort and *assumpsit* cannot be joined; it is therefore material to see whether this second count be framed in the one or the other form. It has been argued that it cannot be in *assumpsit*, because the word *promise* does not occur, and because it merely states that duty in the defendant which the law would impose without a promise. In the case of *Lea v. Welch* (*b*) it was held, that a count was not good in *assumpsit*, no promise being laid; but in that case it was not stated that the defendant either agreed or undertook. Here both those words occur, and the case of *Mountford v. Horton*, which I think a sensible decision, goes the whole length of proving that those words import a promise. The count is therefore in form in *assumpsit*. But it was next said, that as the party had merely agreed to do that which was a common law duty, it was unnecessary to resort to the promise, and therefore it might be rejected, and the count still be considered as in tort. Now the common law duty of the defendant was to take care of the pigs delivered to him, in order that the plaintiff might come and take them away; but the count alleges, that the defendant, in consideration of the reward to be paid, un-

(*a*) 2 N. R. 62.(*b*) 2 Ld. Raym. 1516. 2 S. r. 795.

dertook

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against
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dertook and agreed to take care of the pigs, *and to redeliver them* to the plaintiff, and the breach is that he did not redeliver them. That requires something to be done by the defendant beyond the common law duty. The obligation to redeliver arose out of the agreement alone. In *Coggs v. Bernard* the declaration certainly contained the word *undertook*, but no consideration for a promise was shewn, and the plea was not guilty. There was only one count in the declaration, and no question as to misjoinder could arise. But I think it was properly held to be a count in tort, one essential ingredient to a count in contract, viz., a consideration, not being stated. This count contains an undertaking and a consideration sufficient to sustain the undertaking. It is therefore clearly in assumpsit, and is improperly joined with counts in tort. It is unnecessary to give an opinion as to the possibility of framing a count, setting out merely a common law duty in such a manner that it might be joined with other counts either in assumpsit or case. For these reasons I think that the judgment in the present case must be arrested.

HOLROYD J. I also think that the judgment must be arrested. At first I was inclined to think that the objection was answered, by the argument that the second count discloses a mere common law duty, although arising out of a contract, as in *Mast v. Goodson.* (a) But the count is laid in assumpsit, and not ex delicto, and the undertaking goes beyond the mere duty; the defendant was not only to do that for which the pigs were delivered to him, viz. to take care of them, but also

(a) 3 Wils. 348.

to

to redeliver them; and the breach is more properly a breach of the agreement to redeliver, than of the common law duty to take care of the pigs. *Mast v. Goodson* was certainly founded upon a contract; but the obstruction to the plaintiff's right for which the action was brought was ex delicto, although the right itself arose out of the contract. The breach in the second count cannot be so considered. In *Boson v. Sandford* the Court held, that the action for not safely carrying the goods was not ex delicto, but quasi ex contractu, and that a non-feasance could not be treated as delictum, so as to make the action maintainable against two of four joint owners of the vessel.

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LITTLEDALE J. I am of opinion that the second count of this declaration is in assumpsit, and was therefore improperly joined with a count in trover. It possesses every requisite of a count in assumpsit, and indeed is in the common form with the exception that the word *agreed* is substituted for *promised*. First, the reward is stated, and then that in consideration of it the defendant undertook, &c. Now the case of *Mountford v. Horton* shews that *agreed* is equivalent to *promised*. *Coggs v. Bernard*, and the other cases of that class, are very different from the present, for there, although the word *undertook* was found in the declaration, it was inserted merely as inducement, here it is found as a substantial allegation after the inducement, viz. the delivery of the pigs. Again, if this count were in tort, it would be bad in itself, for in that case the whole of the defendant's duty would have been to take care of the pigs, but the undertaking goes beyond that, it is therefore larger than the purposes for which the pigs were

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were delivered. Suppose a written agreement had been entered into in the terms of this count, it could never have been contended that a breach of it might be laid in tort, it would be as reasonable to lay in tort a breach of an agreement to convey a house or land. For these reasons I concur in thinking that the judgment should be arrested.

Rule absolute.

MITCHELL, Clerk, against FORDHAM.

By an inclosure act, it was provided, that a certain corn rent, "free from all taxes and deductions whatsoever, except land-tax," should be issuing out of the lands to be enclosed, and other lands in the parish, and be paid to the rector in lieu of all great and small tithes, &c.: Held, that this corn-rent was not liable to be assessed to the relief of the poor.

REPLEVIN for seizing plaintiff's goods and chattels. Avowry by defendant as overseer of the poor of the parish of *Kelshall* in the county of *Hertford*, stating that the rector of the said parish before the passing of an act of parliament hereinafter mentioned, was entitled to certain great and small tithes arising, &c. in that parish. That by an act of parliament passed in the 35 G. 3. for inclosing lands in the parish of *Kelshall*, it was enacted, that a certain yearly corn rent, *free from all taxes and other deductions whatsoever, except the land tax*, should be issuing and payable from and out of the lands and grounds thereby intended to be divided and allotted, and the old inclosures, (except as therein excepted) and should be payable by the respective proprietors of the said lands and grounds in the proportions and at the times and place in the act mentioned; which said yearly rent should be in lieu and satisfaction of and full compensation for all the great and small tithes, moduses, compositions, and other dues and payments whatsoever due or payable to the rector of the said rectory for the time

time being. Averment that the plaintiff was assessed to the poor in the sum of 12*l.* in respect of the corn rent by him received in lieu of tithes, and because that sum remained unpaid, defendant, as overseer of the poor of *Kelshall*, distrained plaintiff's goods. Demurrer and joinder.

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Patteson in support of the demurrer. The only question in this case is, whether the words of the statute, "free from all taxes and other deductions except land tax," exempt the corn rent, payable to the rector, from assessment to the relief of the poor. *Chatfield v. Ruston* (*a*) is a direct authority for the plaintiff. It is true that the word *rates*, which was inserted in the act of parliament then before the Court, is not found in that for inclosing lands in *Kelshall*; but the expression "all taxes and deductions" amounts to the same thing. The word *taxation* is used in the 43 *Eliz.* as applicable to the provision raised for the poor. Here too the tithes are extinguished, and therefore the corn rent cannot be treated as paid upon a statutable lease of the tithes, *Rex v. Boldero*. (*b*) In *Rex v. Toms* (*c*), an exemption from "parochial taxes" was held to include exemption from poor rates. In *Lowndes v. Horne* (*d*), and *Rann v. Picking* (*e*), there were no words of exemption, and, consequently, that which was substituted for tithes, was held liable to the same burthens as the tithes themselves.

Robinson contra. The word *rates* is not an immaterial word, and the absence of that in the clause

(*a*) 3 *B. & C.* 863.

(*b*) 4 *B. & C.* 467.

(*c*) *Dougl.* 401.

(*d*) 2 *W. Bl.* 1952.

(*e*) *Cald.* 196.

exempting

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exempting the corn rent from certain burthens, distinguishes this case from *Chatfield v. Ruston*. In the argument there, the word *rates* was treated as applicable to parochial burthens, and *taxes* to parliamentary imposts; and the whole Court, in giving judgment, appear to have relied upon the effect of the word *rates* in the exempting clause. Nor can this be called a deduction, that must be something retained by the payer, but the poor rate is not imposed until the money is in the hands of the rector.

ABBOTT C. J. Inasmuch as tithes are liable to a contributory payment for the support of the poor, there can be no doubt that if, by an act of parliament, a money payment is substituted for tithes, and no express exemption given, it will be liable to the same burthen as the tithes themselves. But where a bargain is made, as in the case of inclosures, the amount payable to the rector will vary according to the existence or non-existence of any agreement as to exemption from taxes and other burthens. The words of this act of parliament, as set out in the avowry, are, that "the rent shall be paid free from all taxes and other deductions whatsoever, except the land-tax;" and the question turns upon the meaning of the words, "all taxes and other deductions." The rector says they include payments made for the support of the poor. The parish say that the word *taxes* does not mean *rates*. It has been already determined, that "parochial tax" meant "poor rate." But is there any thing absurd in speaking of "poor's tax," instead of "poor's rate." I take the former expression to be equally appropriate; it means a sum raised by division upon many, and the very

very expression used in the 43 *Eliz.* is, that "a fund shall be raised by taxation." If the money is raised by taxation it is a tax. I am, therefore, of opinion that the exemption applies to this burthen; and indeed it would be difficult to find any other burthen from which the rector would be exempted by the words of the act of parliament.

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MICHELL
against
FORDHAM.

Judgment for the plaintiff.

The KING against JOHN ATTWOOD, Esq., and
Others.

ON the 29th day of *March 1825*, the churchwardens and overseers of the parish of *Rowley Regis*, in the county of *Stafford*, made a rate for the relief of the poor, in which the above *John Attwood* was assessed as owner and occupier, and *Thomas Devey Wightwick, John Jones and Joseph Fereday, and Josiak Parkes*, were assessed as lessees and occupiers of certain coal mines then at work.

Upon an appeal to the *Midsummer general quarter sessions* for the county of *Stafford*, the rate was confirmed, subject to the opinion of this Court upon the following case:—The appellant, *John Attwood*, was proprietor and occupier of the coal mine upon which the above rate upon him was made (which mine situate in the parish of *Rowley Regis*, in the county of *Stafford*), and had expended upwards of 10,000*l.* in putting the mine and setting it to work. The mine

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The owner and occupier of coal mines is rateable to the poor at the sum for which the mine would let, subject to outgoings.

The lessee of coal mines is rateable for the amount of royalty or rent which he pays, and in neither case is any allowance to be made for money expended in rendering the mines productive.

had

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had been at work one year and a quarter. The value of the whole of the coals which had then been raised from the mine did not exceed 5,000*l.* The full value of the annual produce of the mine in question, after deducting the current expences of working the same, amounted to the sum of 428*l.* 9*s.* Upon that amount the appellant was rated.

The appellant, *T. D. Wightwick*, had been for five months prior to the said 29th day of *March* 1825, lessee of the coal mine upon which the rate upon him was made, and which is situate in the said parish of *Rowley Regis*; and during the five months that he had been lessee he had paid 785*l.* 14*s.* in royalties for coals raised; he had also expended in the purchase of the lease and setting the mines to work, 5,020*l.* During the five months that he had occupied the mine, he had raised coals to the amount of 3,825*l.* 2*s.* 8*d.* The appellant, *T. D. Wightwick*, was rated upon the sum paid for royalties, the sum of 785*l.* 14*s.* being considered by the respondents as the annual value of the royalties paid by him.

The appellants, *John Jones* and *Joseph Fereday*, were the lessees of the coal mines, upon which the rate upon them was made, and which are situate in the said parish of *Rowley Regis*. Sir *Horace St. Paul*, the owner and lessor of the mines, sunk the pits and made preparations requisite for working the mines, and then let them to the appellants, Messrs. *Jones* and *Fereday*, at a certain fixed royalty, not a specific proportion of the amount of sales: 492*l.* 12*s.* 8*½d.* was the amount of royalties paid to the lessor during the last year. The lessees had expended 600*l.* in permanent erections on these mines.

The

The appellants, Messrs. *Jones* and *Fereday*, were rated upon the supposed amount of the annual sums paid for royalties.

The appellant, *Josiah Parkes*, had been eight years lessee of the mine upon which the rate upon him was made, and which is situate in the said parish of *Rosley Regis*, and had expended 2,500*l.* in planting the mine and setting it to work. During the last year he had raised coals to the value of 2,500*l.*, and during that period had paid 585*l.* in royalties, and was rated upon the supposed amount of the annual sums paid for royalties.

The questions for the consideration of the Court are, first, whether under all the circumstances of this case *Mr. Attwood* was properly rated at the sum of 498*l.* 9*s.* in respect of the said coal mine, such sum being the full value of the annual produce of the mine after deducting the current expences of working the same? and, secondly, whether the said *J. D. Wightwick*, *John Jones* and *Joseph Fereday*, and *Josiah Parkes* were rateable in respect of their occupation of the said coal mines to the full amount of the sums paid for royalties upon the coals raised from such mines?

Campbell, *Shutt*, and *Holroyd* in support of the order of sessions. Two objections are made to the rate in this case; first, that the rate should have been not upon the annual value of the produce, but upon the interest of that value. Secondly, that in making the rate, allowance should have been made for the expence of planting the coal mines. The words of the statute 43 *Eliz. c. 2.* are decisive of the first point; the occupiers of coal mines are

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thereby made rateable in respect of the mine; that is, the capital when occupied by the owner; the coal raised is the annual value, and for that the occupier is rateable, whether the adventure be profitable or not. And when the mine is in the hands of a lessee, he is liable to be rated upon the full amount of the royalty or rent which he pays, so long as he continues to work the mine, *Rex v. Parrot* (*a*), *Rex v. Bedworth* (*b*). Then as to the second question, the argument on the other side must go the length of saying that no rate can be made upon the mines until the expence of planting them has been repaid, for no proportion of those expences can ever be fixed as proper to be deducted before the rate is made. But *Rex v. Mast* (*c*) shews that the property is rateable for the improved value, without taking into consideration the expence of making the improvements. If a canal is cut, the whole of the produce of the tolls is immediately rateable, so if a house is built it is rateable as soon as occupied. The same principle applies whether the premises be in the hands of the owner or occupier. The rent is the value after deducting the outgoings, *Rex v. Hull Dock Company* (*d*). Here the tenants agree to pay a certain proportion of the produce as royalty or rent, for that sum they are rateable. *Attwood*, who occupies his own mine, is said to have made a certain clear profit after deducting expences; that, therefore, would be the amount of royalty if the mine was in the hands of a tenant, and he is, therefore, rateable for that sum.

(*a*) 5 T. R. 593.

(*c*) 6 T. R. 154.

(*b*) 8 East, 387.

(*d*) 3 B. & C. 516.

The

The Solicitor General, Oldnall Russell, and Whately contra. The important question for consideration is, whether the mode of rating coal mines which generally prevails has been well considered. All the other things mentioned in the 43 Eliz. c. 2. as the subject matter of rating are of a permanent nature, but the coal in a mine is the capital, it is the soil and freehold, and the sum produced by the sale of it must be considered as the purchase money of a part of the estate. The rate, therefore, should not be upon the whole sum produced by the sale of the coals, but upon the interest of that sum. *Rex v. Parrot* and *Rex v. Bedworth* are the only cases upon the rating of coal mines, and in neither of them was the attention of the Court called to the circumstance that the subject matter of the rate was part of the realty, and not being renewable, would in a few years be exhausted. But on another ground *Attwood* was not rateable at all; the monies expended by him had never been repaid, and, therefore, the mine had never become productive. Now it is difficult to find any difference between the case of a mine which has never become productive, and one that has ceased to be so, and in the latter case it is not rateable, *Rex v. Bedworth*; and in *Rex v. Dursley* (a) it was held that stock in trade was not rateable, because not proved to be productive. At all events, *Attwood* is rated too high in proportion to the other appellants, the rate upon him is in respect of the full value of the annual produce of the mine; now that includes both the landlord's and tenant's profit; the rate certainly

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(a) 6 T. R. 53.

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cannot be good if imposed upon more than the estimated value to let. As to the other parties, the rate upon the royalties cannot be supported. If the owner is to be considered as the seller of part of the realty, the lessee is the purchaser, and the royalty is the purchase money; the rate, therefore, should be not on the royalty, but on the sum at which the mine could be let subject to the royalty.

ABBOTT C. J. We are all of opinion that the owner and occupier of a coal mine should be rated at such sum as it would let for, and no more. As to the other points, the first was, that the rate should not be imposed upon the coal produced, because that was part of the realty. It is the first time that such a proposition has ever been submitted, although many coal mines in various parts of the country have constantly been rated, and the argument in support of it is wholly untenable. The legislature has expressly made coal mines rateable, and they must be rated for what they produce, viz. the coals. Slate quarries and brick earth are also exhausted in a few years, but nevertheless the rate is always imposed upon that which is produced. The other argument was, that the rate could not be imposed until the expence of planting the mine had been recouped. But I cannot discover any distinction between expences incurred in bringing a mine to a productive state and in building a house. The attempt to distinguish them is perfectly novel, and if a house is to be rated as soon as built and occupied, it must follow that a coal mine is rateable as soon as it is set at work and produces coals, although it may happen that the expence of sinking it

may

may never be recovered. If the tenant of a mine expends money in making it more productive, that is the **same** as expending money in improving a farm, or a **house**, in which cases the tenant is rateable for the **improved** value.

Order of sessions amended as to the rate upon *Attwood*, and confirmed as to the residue of the rate.

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The KING against HOLSWORTHY.

UPPON an appeal against an order of two justices, *A.* being enrolled as a substitute in the militia, hired himself for a year, and performed a year's service under that contract : Held, that as it did not appear that the pauper at the time of hiring informed the master that he was a militia man, no settlement was gained by serving a year under such contract.

whereby *F. H. Trim*, his wife and child, were removed from the parish of *Thornbury*, in the county of *Devon*, to the parish of *Holsworthy* in the said county, the court of quarter sessions confirmed the order, subject to the opinion of this Court on the following case.

In the month of *May* 1819, the pauper being a single man, was enrolled as a substitute in the *South Devon* militia as a private to serve for the space of five years ; and in *June* 1822, while he was still a member of the corps, being at *Plymouth*, he offered himself as a recruit to one *George M'Gie*, a private in the fifteenth regiment of infantry, who paid him a shilling for enlisting money, and took him to a serjeant of the regiment, and he was, after inspection by the surgeon, sworn in before the mayor of *Plymouth* as a recruit in that regiment for unlimited service. At the time of receiving the shilling from *M'Gie*, he informed him that

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he belonged to the *South Devon* militia, and was by him told not to mention it. He did not mention it either to the serjeant, the surgeon, or the commanding officer of the regiment. For this offence he was subsequently tried, convicted, and imprisoned. In *February 1823*, he being still a single man, hired himself for a year to one *Penwarden*, in the parish of *Holswothy*, and performed a year's service in that parish under that hiring. The question for the opinion of the Court was, whether by such hiring he gained any settlement in that parish.

Crowder in support of the order of sessions. The question is, whether the pauper was *sui juris*, so as to make a valid contract to serve for a year at the time when he hired himself to *Penwarden*? He was not at that time a soldier in the fifteenth regiment. The pauper was in the militia at the time of his enlistment, and consequently by statute 42 G. 3. c. 90. s. 64. his enlistment was void; that statute subjects him to punishment for concealing the fact of his being in the militia, and enacts, that the party so enlisting is to belong to the corps in which he enlisted only from the expiration of his service in the militia. Now, here the service in the militia was to continue for five years from *May 1819*, which had not expired during the service with *Penwarden*. Secondly, as a militia man he was sufficiently *sui juris* to contract to serve for a year, and the service under it for a year confers a settlement. It may be urged, either that the pauper was not *sui juris* to contract, or if he was, that it must necessarily have been an exceptive, or a fraudulent hiring. As to the first point,

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it will be said that a militia man subject to be called upon to discharge his duty at any moment, cannot bind himself to serve a master for a year, and *Rex v. Norton* (*a*) will be cited. That was the case of a deserter hiring himself for a year, and it was held to be no lawful hiring; but there the pauper had committed an offence against the law, and every moment of his continuance in the service was an illegal act. In *Rex v. Beaudieu* (*b*), an invalided soldier at a depot, by permission of the commanding officer, and authorised by government, hired himself for a year and served a year. Lord *Ellenborough* C. J. and *Le Blanc* J. held, that no settlement was gained by reason of the pauper's liability to be called upon if the country required his services. *Bayley* J. thought the hiring and service sufficient, there being a lawful hiring for a year, though a conditional one. That case, therefore, is not one of any great authority. Every man is to this purpose *sui juris* who may lawfully hire himself for a year. It is not necessary that he should at all events be liable to accomplish his year's service. It is quite different from the case of an apprentice, he cannot lawfully contract, being subject to the controul of his master during the whole period of his apprenticeship to him. A militia man is free for the whole year, with the exception of the period of service mentioned in the acts of parliament, if he is called upon to exercise himself in that way. Then this is neither an exceptive nor a fraudulent hiring. It is not exceptive, even if it be assumed that *Penwarden* did not know the pauper to be a militia man. It is a contract in the

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(a) 9 East, 207.

(b) 3 M. & S. 239.

nature

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nature of a conditional, and not an exceptive hiring, according to the distinction laid down in *Rex v. Byker* (*a*). It must be presumed, that the pauper at the time of hiring communicated to his master that he was in the militia, for the concealment of that fact would be fraudulent, and fraud is not to be presumed; it ought to be expressly found, the Chancellor of the University of Oxford's case (*b*), *Bennett v. Clough* (*c*), *Rex v. Twyning* (*d*), *Williams v. The East India Company* (*e*), *Rex v. Fillongley* (*f*), *Rex v. Llanbedergoch* (*g*), *Rex v. Weston* (*h*), *Rex v. Newnham* (*i*). Besides, *Rex v. Westleigh* (*k*) and *Rex v. Winchcomb* (*l*) are authorities to shew, that under such a hiring a settlement may be gained.

BAYLEY J. I think this case does not admit of any doubt. It is not necessary to say whether a militia man may or may not gain a settlement by serving under a yearly hiring for a whole year, if at the time of making the contract he communicates to the party with whom he is contracting that he is in the militia, and therefore liable to be called out during the year. If the master chooses to engage the servant subject to the risk of his being called upon to perform duty as a militia man during the year, I do not see that there is any thing illegal in such a bargain. It may be considered a con-

- (*a*) 2 B. & C. 120.
- (*c*) 1 B. & A. 461.
- (*e*) 3 East, 192.
- (*g*) 7 T. R. 105.
- (*i*) *Burr. S. C.* 756.
- (*l*) *Doug.* 391.

- (*b*) 10 Rep. 56 *a*.
- (*d*) 2 B. & A. 386.
- (*f*) 2 T. R. 709.
- (*h*) *Burr. S. C.* 166.
- (*k*) *Burr. S. C.* 753.

ditional

ditional hiring, and if during the year the militia be not called out, a settlement may perhaps be gained by serving under it. But what is the contract of hiring in this case? The contract is one by which the master stipulates to have and the pauper stipulates to give his services for one whole year. There is no qualification or condition whatever in the contract, and if there were any, it ought to have been stated in the case, and cannot be inferred. I do not presume fraud, for the non-communication of the fact of the pauper's being in the militia may have arisen from his considering it wholly immaterial, from omission, or from other circumstances. Without, therefore, breaking in upon any case in which it has been decided that a militia man, who in his contract of hiring stipulates for the time that he may be called upon to perform his duty in the militia, may gain a settlement by serving for a whole year under such a hiring, I think that the pauper not having communicated to the party whom he contracted to serve for the whole year that he was in the militia, cannot be said to have lawfully hired himself for a whole year within the meaning of the *S. W. & M. c. 11. s. 7.*, and that being so, I am of opinion no settlement was gained in the parish of Holsworthy.

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HOLROYD J. I am of the same opinion. It is not to be presumed, without being stated in the case, that the pauper at the time of making the contract with his master, communicated to him that he was in the militia, and there is nothing on the face of the case to shew that such a communication was made. This case seems to fall within the principle laid down by Lord *Ellenborough* in

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in *Rex v. Norton* (*a*). He there says, "A variety of cases have occurred which have decided the question in the case of an apprentice; and this, not on the ground of its being an excepted case, or as standing upon any occult efficacy in the indenture of apprenticeship, but on the broad principle that one who has contracted a relation which disables him from serving any other without the consent of his first master is not *sui juris*, and cannot lawfully bind himself to serve such second master so as to gain a settlement by serving for a year under such second contract. In reason and principle it cannot make any difference whether he be originally bound by a contract of apprenticeship or by any other contract equally obligatory upon him, which disables him from binding himself to serve a second master." It is said that this case differs from that, because the militia not having been called out during the year, there was a year's service under a conditional hiring, but the objection is, that the pauper was not capable of making a contract so as to give the master a control over his services during the whole year. Now no communication having been made to the master that the pauper had entered into a contract to serve in the militia I am of opinion that this must be considered an absolute and not a conditional hiring for a year. And if that be so, then it is quite clear that the pauper was not capable of making an unconditional contract to serve for a whole year. I am therefore of opinion, in this case, that the pauper was not lawfully hired in the parish of *Holswothy* for one whole year, within the meaning of the 3 *W. & M.* c. 11. s. 7.

(*a*) 9 *East*, 209.

LITTLE

LITTEDALE J. concurred.

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Order of sessions quashed.

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~~Fraser~~ and *Coleridge* were to have argued against the
order of sessions.

ROE on the Demise of GEORGE RICHLEY and
BRIDGET, his Wife, *against* BURN.

EJECTMENT to recover the possession of an undivided fourth part of a dwelling-house and orchard, with the appurtenances, in the parish of *Corbridge*, in the county of *Northumberland*. The declaration contained two demises, first by *George Richley*, and *Brigid* his wife. Second by *George Richley* alone. The demises were laid on the 2d April 1825. Plea, the general issue. At the trial before *Bayley* J., at the *Northumberland* Summer assizes 1825, a verdict was found for the lessor of the plaintiff, subject to the opinion of the Court on the following case. *William Burn*, of *Corbridge*, in the county of *Northumberland*, being seised in fee of the premises, whereof one fourth part is sought to be recovered in this action, on the 12th day of *March* 1805, made the following will, which was duly executed and attested, so as to pass real estates. "In the name of God, amen. I, *William Burn*, of *Corbridge*, gardener, in the parish of *Corbridge*, in the county of *Northumberland*, being in perfect understanding, but weak in health, praised be God, do make this my last will and

~~the other that is surviving:~~ Held, that the freehold estate was devised to *A. B.*, *J. B.*, ~~I. B.~~, and *B. N.*, and that *B. N.*, having been ousted by *A. B.*, might maintain ejectment for one undivided fourth part.

testament,

Testator made a will, duly executed to pass real estates, in the following terms: "I give and bequeath to my son *N.* 20*l.* extra more than any other of my sons; and likewise unto *A. B.*, my wife, the whole of my effects during her life; also the freehold estate which I now enjoy, I bequeath as follows: *A. B.*, my daughter, *J. B.* and *I. B.*, my sons, likewise *B. N.*, all the last-mentioned names to be all equal sums, whatever it may amount to, except any of the aforementioned should die, then their shares to be equally divided among

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RO^R
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 BEAM

testament, as followeth ; that is to say, I give and bequeath unto my son *William*, which is now absent from home, 20*l.* of money of *Great Britain* extra, more than any other of my sons ; and likewise unto *Ann Burn*, my wife, the whole of my effects during her life, also the freehold estate which I now enjoy, I bequeath as follows, *Ann Burn*, my daughter, *James Burn* and *John Burn*, my sons, likewise *Bridget Burn*, otherwise *Newbigun*, all the last-mentioned names, to be all equal sums, whatever it may amount to, except any of the aforementioned should die or be deceased, then their shares to be equally divided among the other that is surviving. In witness, &c." The testator died within a few days after the making of this will, leaving all the persons therein named him surviving. *George Richley*, one of the lessors of the plaintiff after the testator's death, intermarried with the said *Bridget Burn*, otherwise *Newbigun*, the other lessor of the plaintiff. Upon the testator's death, his widow entered into possession of the house and orchard, with the appurtenances at *Corbridge*, and continued to hold them until her death, in *December* 1824. Upon her death the defendant, her daughter, and one of the devisees in the will, possessed herself of the whole of the said premises, and still retains the possession, having actually ousted the lessors of the plaintiff therefrom.

Alderson for the plaintiff. It must be admitted that the will in question is very obscure, but if the Court can discover what was the intention of the testator, they must so construe the will as to carry that intention into effect. The bequest to the absent son *William* does not appear to be material to this case. Next follows the provision

provision for the testator's wife, and that shews an intention to dispose of all his property. " Likewise unto *Ann Burn*, my wife, the whole of my effects during her life." Now the word *effects* is large enough to pass real estates, provided such appears to have been the intention, *Doe v. Lainchbury* (a). The widow, therefore, took an estate for life in the premises in question, and the subsequent devise of the freehold estate gave a remainder in fee to the four persons named as devisees, whether as joint tenants or tenants in common, is immaterial. The testator must have intended the devise to them to come into possession after the death of the widow, as it would otherwise be inconsistent with the former part of the will.

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against
Bull.

Cresswell contrà. It is true as a general proposition, that the Court must in construing a will, give effect to the devisor's intention, but they ought only to do so as far as they can consistently with the rules of law, not conjecturing, but expounding his will from the words used ; per Lord *Kenyon* in *Lane v. Stanhope* (b), which limitation of the rule received the approbation of Lord *Eldon* in *Thompson v. Lawley* (c). If, therefore, the words of the will are so obscure as to be incapable of receiving any reasonable construction ; or if they are open to several equally reasonable constructions, the devise is void for uncertainty, and the real estate descended to the heir at law. Now the testator's son *William* appears to have been the primary object of his bounty, he was to have 20*l.* more than the other sons, but the testator has not specified any fund out of which he was to receive it. If the con-

(a) 11 *East*, 290.(b) 6 *T. R.* 545.(c) 2 *B. & P.* 508.

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truction contended for by the lessors of the plaintiff were to prevail, he would probably have 20*l.* less, instead of so much more than his brothers. The testator could not mean it to be paid out of his personal property, for the whole of that is given to the widow. It is said that by the word *effects* the real estate also was given to her for life, but if so it must be supposed that the testator in one line of his will described his real property as *effects*, and in the next as *freehold estate*. There is no case in which real property has passed under the word *effects*, when other words more appropriate were found in the will. And yet it is possible that the testator intended his real property to go to his wife, for if the will be read without a stop after *her life*, it will have the effect of giving to her the freehold estate also. And whether that devise was for life or in *fee* is immaterial to the present question. If, however, the Court read the will with a stop after *her life*, and consider "also the freehold estate, &c." as the commencement of a new sentence, and so to operate as a devise of that property for the benefit of the persons after named, it is clear that the testator did not intend them to take the estate itself, but that the estate should be sold and the proceeds divided, for they are to be in *equal sums*. In *Hyde v. Hyde* (a), a devise of an estate to testator's two sons, in trust for several grandchildren, "share and share alike, and to be paid each of them their shares, as they shall attain the age of twenty-one years," was held to be a devise in trust to sell. It is also probable, (for upon this will nothing can be said to be clear,) that *William* was to have out of the proceeds

(a) Decided by the Vice-Chancellor in 1819, and not reported.

of the estate 20*l.* more than the other sons. If that be the true construction of the will, the legal estate descended to the heir at law, and the lessors of the plaintiff have no legal title upon which they can recover in this action.

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———
Rox
against
Bush.

Alderson in reply. It is impossible to say that *William* was to have the benefit of the devise of the real estate. The will gives to him 20*l.* more than the testator's *other sons*; but the devise of the real property is to four persons, two of them being sons, one a daughter, and the fourth neither a son nor daughter of the testator. Then, as to the argument that the testator intended his estate to be sold, it is clear that the four devisees were at all events to receive and divide the proceeds; they, therefore, were the persons to sell, according to *Bentham v. Wilshire* (a), in which a passage is cited from *Sheppard's Touchstone*, p. 43., which shews, that where a real estate is devised to be sold for payment of debts, and the person to sell is not specified, as the proceeds are to pass through the hands of the executors, they are the persons to sell.

ABBOTT C. J. It is certainly far from being easy to discover how the absent son *William* was to receive 20*l.* more than the other sons of the testator. It has been argued, that he was probably to receive it out of the proceeds of the real estate, when sold. But I think

(a) 4 Mod. 44. In that case *A. B.* devised an estate to *H. B.* for life, and directed that, "after her decease the estate should be sold by public auction, and the money be disposed of amongst certain illegitimate children named in the will, first paying *G. B.* a legacy of 5*l.*;" and it was held that the testator's *heir at law* was a necessary party to the sale.

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 Rox
 against
 Burn.

we cannot collect that from the last clause of the will, inasmuch as the devise there is in favour, not of sons only but in favour of a daughter, and of a person neither son nor daughter. But it is not necessary for us to decide that point; neither is it necessary for us to say, whether or no the estate was given to the wife for her life ;but I think the words, “ also the freehold estate which I now enjoy,” cannot be connected with the previous words of devise to the widow, for then there would be nothing upon which the subsequent part of the will could operate. In order to supply some object of gift to the four persons named in the last clause of the will, we must hold that the freehold estate was devised for their equal benefit; and then, supposing the testator intended that the estate should be sold before it was divided, still the same four persons were to have the benefit; and in order to have that benefit they were the proper persons to sell. It follows, that as the estate has not been sold the lessors of the plaintiff are entitled to maintain ~~this~~ action for one-fourth.

BAYLEY J. I cannot think that the latter clause gives the son *William* a claim to have his 20*l.* out of the ~~real~~ estate. Then, laying aside that question, it appears to me, that the devise to the widow ceases at the word “ during her life;” for the word “ also,” which follows, is, according to the general rule, to be considered as the commencement of a new clause. Besides, unless the freehold estate is given to the persons afterwards named, they would take nothing; and the expression “ whatever *it* may amount to,” leads to the same conclusion.

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 ROG
against
BURN.

HOLROYD J. I think that the devise to *William* was of 20*l.* more than the other sons out of the personal estate. I think, also, that by the last clause the freehold estate was devised to the four persons therein named; and that whether the estate itself was to be divided, or whether it was to be sold, and the proceeds divided, the devise was equally to them. The lessors of the plaintiff are, therefore, entitled to one-fourth of that estate.

Postea to the plaintiff.

HOBSON and Another *against* MIDDLETON.

COVENANT. The declaration stated, that by a certain indenture, made between *William Thomas Hislop*, of the first part; the defendant, *Middleton*, of the second part; and the plaintiffs, executors of *Samuel Hobson*, of the third part; the defendant, "for the consideration therein mentioned, did, according to his estate, right, and interest in the premises thereinafter mentioned, but not by way of warranty or covenant for title, or further or otherwise bargain, sell, and demise; and the said *W. T. Hislop* did grant, bargain, sell, demise, ratify, and confirm unto the plaintiffs certain premises, in the indenture particularly described, habendum to the plaintiffs for 500 years. And the defendant covenanted with the plaintiffs, that he had not, at any time or times theretofore, made, done, or committed, or executed or knowingly or willingly permitted, or suffered any act, deed, matter, or thing whatsoever, whereby or by reason or means whereof the said premises thereinafore mentioned and intended to be thereby granted

Where in pleading an equivocal expression is used, in general that is to be construed against the party using it; but if the opposite party pleads over, it is to be construed in that sense which will support the previous pleadings.

Covenant, that defendant had not done, nor permitted nor suffered to be done, any act whereby an estate was encumbered : Held, that assenting to an act which the covenantor could not prevent, was not a breach of the covenant.

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and demised, or any part thereof, were, could, should, or might be impeached, charged, encumbered, or affected in title, charge, estate, or otherwise howsoever." Breach, that the defendant had, before the time of making the indenture, made, done, and executed certain acts and deeds, whereby the said premises were impeachable, charged, encumbered, and affected in title, charge, and estate; that is to say, he the defendant heretofore, and before the making of the said covenant, to wit, on, &c., at, &c., by a certain conveyance or assurance, parted with and conveyed his right, title, estate, and interest in the said premises to one *Joseph Scholes*, to wit, at, &c. Second breach, that defendant, before the making of the indenture, had made, done, committed, and executed, and knowingly and willingly *permitted and suffered to be done*, certain other acts, deeds, matters, and things, whereby and by reason whereof the said premises were impeachable, charged, encumbered, and affected in title, charge, and estate; that is to say, he, the said defendant, heretofore, and before the making of the said indenture, to wit, on, &c., at, &c., did execute a certain deed or indenture, between *W. T. Hislop*, of the first part; the defendant, of the second part; and one *Joseph Scholes*, of the third part; and one *Edwin Ford*, of the fourth part; and did *suffer and permit* the said *W. T. Hislop* to execute the said indenture, whereby the said premises were impeachable, charged, encumbered, and affected in title, charge, and estate. The defendant pleaded, first, the general issue. Secondly, that long before and at the time of the making the said conveyance to *Joseph Scholes*, in the declaration mentioned, one *Robert Tudor* was seised in his demesne as of fee, of and in the premises in the declaration mentioned; and being

being so seized, by a certain indenture, bearing date the 25th day of *March* 1813, made between the said *Robert Tudor*, of the first part; *W. T. Hislop*, of the second part; and the defendant, of the third part; *Robert Tudor*, for the sum of money therein mentioned, did bargain, sell, alien, release, and confirm the premises (then in the actual possession of the said *W. T. Hislop* and the defendant) to the said *W. T. Hislop* and the defendant, their heirs and assigns, to have and to hold the same to the said *W. T. Hislop* and the defendant, their heirs and assigns, to the use and behoof of *W. T. Hislop* and his assigns, during the term of his natural life; and from and after the determination of that estate, by any means in his lifetime, to the use of the defendant, his executors, &c., during the natural life of *W. T. Hislop*, in trust for *W T: Hislop* and his assigns, and to be conveyed and disposed of as he or they should direct or appoint; and from and after the determination of the estate so limited to the defendant, to the only proper use and behoof of *W. T. Hislop*, his heirs and assigns for ever. And the said defendant was, at the time of the making of the conveyance to *Joseph Scholes*, as in the declaration mentioned, possessed of such estate and interest in the premises as in this plea is above stated, and of no other estate or interest whatever in the same; and being so possessed of such estate and interest in the said premises as aforesaid, and having no other or greater estate or interest in the premises than as aforesaid, he the defendant did afterwards, and before the making the indenture in the said declaration mentioned, to wit, on, &c., part with and convey his said right, title, estate, and interest in the said premises to the said *Joseph Scholes*, in manner and form as in the declaration is mentioned, without this, that by the said

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conveyance to *Joseph Scholes* of the said right, title, estate, and interest of him the defendant in the premises, the hereditaments and premises in the declaration mentioned were impeachable, charged, encumbered, or affected in title, charge, or estate, in manner and form as the plaintiffs have, in their declaration in that behalf above alleged; and this he, the said defendant, is ready to verify, &c. Fifth plea was the same, with the exception of the traverse, which was omitted. To the second breach defendant pleaded, secondly, that nothing passed by the indenture in that breach mentioned, whereby the premises were impeachable, charged, &c.; and this, &c. Sixthly, as to so much of the second breach as related to *permitting and suffering Hislop to execute*, defendant protesting that he did not permit or suffer *W. T. Hislop* to execute the indenture in the second breach mentioned, for plea said, that he *could not prevent* his executing it; and this, &c. Demurrer to the second and fifth pleas to the first breach. Replication to the second plea to the second breach, that an interest did pass by the indenture in that breach mentioned, whereby the said premises were charged, encumbered, and affected in title, &c., concluding to the country. To the sixth plea to the second breach, that *William Thomas Hislop* executed the said indenture *with the consent of* the defendant; concluding with a verification. Joinder in demurrer to the second and fifth pleas. Demurrer to the replication to the second plea to the second breach, assigning for causes, that it was not stated by that replication what interest passed by the said indenture, by which the premises or any part thereof could be charged, encumbered, or affected in title, nor was it stated or shewn from whom or which of the parties to that indenture

denture any interest in the premises passed ; and also, that the replication did not deny or take any certain issue upon any fact asserted in the said second plea, but disclosed new matter to the Court, and should have concluded with a verification, and not to the country. General demurrer to the replication to the sixth plea to the second breach. Joinder in demurrer.

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Parke in support of the demurrer to the pleas. The second plea to the first breach is clearly bad, for it states the interest which defendant had at the time of executing the conveyance to *Scholes*, admits that it passed by that conveyance, and then traverses that the estate was thereby encumbered. Now, the effect of the conveyance is matter of law, and therefore not traversable. The fifth plea is the same as the second, omitting the traverse, and that which is admitted by the plea amounts to a breach of the covenant. It shews that the defendant had the legal estate in remainder after the determination of *Hislop's* life estate by forfeiture, or otherwise in his life time. That was a vested estate, although in trust for *Hislop* and his assigns, and if it was conveyed for a valuable consideration, without notice of the trust, *Scholes* would hold the estate discharged of the trust; and even if it were conveyed with notice, so that *Scholes* might in equity be declared a trustee for the plaintiff, still that would be forcing *Scholes* upon the plaintiff as a trustee. [*Bayley* J. We cannot take notice that a court of equity would make *Scholes* a trustee.] Then the conveyance was clearly a breach of the covenant. The second breach is different. [*Bayley* J. How do you shew that the defendant could prevent *Hislop* from executing the indenture?] Perhaps he could not,

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against
Minsterton.*

but non constat that the purchaser would have accepted the conveyance from *Hislop* unless the defendant had consented to and joined in the conveyance; and if that were the case, then his consent as alleged in the replication to the sixth plea to the second breach, was a breach of the covenant. [*Bayley* J. I am disposed to think that the words, "permit and suffer" in the covenant, must be more strictly construed.]

Wightman contra. The conveyance by the defendant who was merely a trustee for *Hislop*, was not such an act as comes within the covenants stated in the declaration. He had, indeed, a vested estate in remainder after the determination of *Hislop's* life estate, but until that is determined, the incumbrance by the defendant's conveyance cannot arise, and *Hislop's* life estate is, in contemplation of law, greater than the term of 50 years. [*Holroyd* J. It cannot be denied that the conveyance to *Scholes* was of part of the estate; the first breach is therefore established.] The second breach is of more importance. But that does not state from whom the conveyance proceeded, nor what interest passed, and the replication to the sixth plea is equally general and uncertain. It should have shewn that something passed from some person capable of encumbering the estate. [*Holroyd* J. The declaration states, that by your execution and *Hislop's*, by your permission, the estate was impeachable in title. The defendant might have pleaded that the estate was not impeachable, but as he has thought fit to plead that no interest passed, he should have shewn the nature of the instrument which was within his knowledge.] Supposing the plea to be bad, the Court must go back to

the first fault, and that is in the assignment of the breach, which leaves it in doubt whether the estate was or was not impeachable by means of the execution of the indenture by *Hislop* and the defendant. At all events, the sixth plea to the second breach is good, viz. that defendant could not prevent *Hislop* from executing, and the replication that defendant consented is not any answer; for his consent to that which he could not prevent was immaterial.

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against
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Parke in reply. 'The words "permit and suffer" do not necessarily apply to acts over which the party had a controul. In *Butler v. Swinnerton* (a), a very comprehensive meaning was attributed to "privity and procurement."

BAYLEY J. I am of opinion that the plaintiff is entitled to recover on the first breach, and to judgment on the demurrer to the replication to the second plea to the second breach, but that the defendant is entitled to judgment on the sixth plea to that breach. The second plea to the first breach, after a long inducement, concludes with a traverse, which is merely of matter of law, and therefore bad. Then the fifth plea to the first breach states the facts set out in the inducement to the second plea, and omits the traverse. Upon those facts it is clear that the defendant had a legal estate to come into possession on the determination of *Hislop's* life estate during his life. That estate the defendant has conveyed away, and although the mischief may be nominal, yet we cannot take that into consideration, we

(a) *Cro. Jac. 656.*

cannot

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against
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cannot look to the trusts which would attach upon the estate in the hands of the purchaser. We now come to the second breach, which is, "that the defendant before the making of the indenture sued upon, did execute a certain deed or indenture between *W. T. Hislop*, the defendant, and *Joseph Scholes*, and *Edwin Ford*, and did suffer and permit *Hislop* to execute it, whereby the premises were impeachable in title." The second and sixth pleas to that breach raise two questions. The second plea is, that "nothing passed by that indenture whereby the premises were impeachable in title." The replication is, that "an interest did pass whereby the premises were impeachable." Then follows a special demurrer, because the replication does not state the nature of that interest nor from whom it passed, and that for any thing stated in the replication it might have passed from one of the other parties, and not from the defendant or *Hislop*. Now the nature of the interest conveyed was of course more peculiarly within the knowledge of the defendant; the plaintiff, therefore, was not bound to state it. With a view to the other cause of demurrer, we must look to the breach. The meaning of the word *whereby* there used is certainly equivocal, for it may mean that the premises were rendered impeachable in title by the deed, or by the execution of the deed by defendant, and by his suffering and permitting *Hislop* to execute. If the word *whereby* applies to the deed generally, the breach is bad, if to the execution by defendant and *Hislop*, it is good. Now, although in general in pleading, an equivocal expression is to be construed against the party using it, yet where the opposite party has pleaded over, that is an admission that the expression is to be taken in that sense which will support the

the previous pleading, *Avery v. Hoole.* (a) Here the defendant by pleading over, that nothing passed by the indenture whereby the premises were encumbered, must mean that nothing passed by the execution by defendant and *Hislop*, and then upon the replication that question is put in issue; it appears to me, therefore, that the replication is good, and that the plaintiff is entitled to judgment upon the demurrer to that replication. We now come to the sixth plea, to the second breach which is pleaded to so much of it as relates to "permitting and suffering" *Hislop* to execute the indenture in that breach mentioned. The plea says that the defendant could not prevent it; the plaintiff replies that *Hislop* executed with the consent of the defendant, and the question is, whether that consent was a breach of the covenant. Now the words "permitting and suffering" do not bear the same meaning as "knowing of and being privy to;" the meaning of them is, that the defendant should not concur in any act over which he had a controul. As far as the execution of the deed by himself, he admits the breach, but as to the residue, says he could not prevent it; and if "permitting and suffering" applies only to that which he could prevent, it is clear that his consent in this case was not a breach of the covenant. It has been suggested, that, perhaps, the purchaser might have refused the conveyance unless it were made with the consent of the defendant, but the Court cannot raise that point, inasmuch as the replication does not allege that the consent of the defendant was an ingredient in the transaction necessary to the acceptance of the conveyance.

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against
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CASES IN HILARY TERM

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HOLROYD J. I am of the same opinion upon all the questions in this case. The traverse in the second plea is bad on two grounds; first, it is a traverse of matter of law; secondly, it is inconsistent with the inducement. The fifth plea discloses a breach of covenant, and, therefore, upon that part of the pleadings the plaintiff is entitled to judgment. Upon the second breach, I think that the permission therein mentioned is not such as to be within the meaning of the covenant. If the deed conveying to Scholes would operate as effectually if executed by Hislop without the defendant's permission as with it, then the permission really has nothing to do with the deed. The covenant extends to such permissive acts only as have, through the permission, an operative effect in charging the estate.

Judgment for the plaintiff upon the demurrer, to the second and fifth pleas to the first breach, and upon the demurrer to the replication to the second plea to the second breach; and for the defendant upon the demurrer to the replication to the sixth plea to the second breach. (a)

(a) Littledale J. was sitting at the Old Bailey.

1827.

**Doe on the demise of LLOYD against
PASSINGHAM.**

EJECTMENT for lands in the county of *Merioneth*.
 Plea, the general issue. At the trial before *Burrough J.*, at the last Summer assizes for *Salop*, it appeared that the lessor of the plaintiff claimed as devised in tail under the will of *Catherine Lloyd*, who was co-heiress, with her sister *Mary*, of *Giwn Lloyd*, who died in 1774. In 1746, by indenture made between himself, *G. Lloyd*, of the first part, *Sarah Hill* of the second part, *Sir Rowland Hill* and *John Wynne* of the third part, and *Sir Watkin Williams Wynne* and *Edward Lloyd* of the fourth part; in consideration of an intended marriage with the said *Sarah Hill*, and of a sum of 8000*l.*, being the marriage portion of the said *Sarah Hill*, paid or secured to be paid to him *Giwn Lloyd*, he, *Giwn Lloyd*, did grant, release, and confirm unto the said *Sir Watkin Williams Wynne* and *Edward Lloyd* in their actual possession then being, by virtue of an indenture of bargain and sale, &c., and to their heirs and assigns, certain premises therein particularly described, and, amongst others, the premises in question; to have and to hold the said premises with their appurtenances, unto the said *Sir Watkin Williams Wynne* and *Edward Lloyd*, their heirs and assigns; to the only proper use and behoof of them the said *Sir Watkin Williams Wynne* and *Edward Lloyd*, their heirs and assigns for ever, upon trust, nevertheless, and subject to the several

Where an estate was limited to *A.*, to the use of *A.* in trust for *B.*: Held, that *A.* took the legal estate, and that although he took it by the common law, and not by force of the statute of uses, yet the second use could not be executed by the statute.

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several uses, intents, and purposes thereafter mentioned, that is to say, to the use of the said *Giwn Lloyd* and his heirs until the said intended marriage should take effect, and from and after the solemnization of the said intended marriage, then to the use and behoof of *Giwn Lloyd* and *Sarah* his intended wife, and their assigns, for and during the term of their natural lives, and the longer liver of them, as and for her jointure and in lieu and full satisfaction of dower; and from and after the decease of such survivor to the use of Sir *Rowland Hill* and *John Wynne*, their executors, administrators, and assigns, for the term of 1000 years, to and for the several intents and purposes thereafter mentioned; and from and after the expiration or other sooner determination of that estate, to the use and behoof of the first son of the body of the said *Giwn Lloyd* on the body of the said *Sarah Hill*, his intended wife, lawfully to be begotten, and the heirs male of the body of such first son lawfully issuing; and for default of such issue, to the use and behoof of the second son in like manner, and then to the daughters; and for default of such issue, to the use and behoof of the said *Giwn Lloyd*, his heirs and assigns for ever. And it was thereby declared and agreed by and between all and every the said parties to the said indenture, that the term of 1000 years thereinbefore limited to Sir *Rowland Hill* and *John Wynne*, was upon trust that they did and should immediately after the decease of *Giwn Lloyd*, by sale or mortgage of the whole or any part thereof, raise the sum of 3000*l.* to be paid and applied in manner thereafter mentioned. And it was thereby declared and agreed by and between the parties to the said indenture that a sum of 4000*l.* of the said sum of 8000*l.*

should

should immediately after the solemnization of the said intended marriage be paid into the hands of them the said Sir *Rowland Hill* and *John Wynne*, upon trust that the same should be paid, laid out, and applied by them with all convenient speed in the purchase of freehold lands, tenements, or hereditaments in fee simple, in the county of *Merioneth* aforesaid or elsewhere in the principality of *Wales*, or in that part of *Great Britain* called *England*, with the approbation of them the said *Giwn Lloyd* and *Sarah Hill*, his intended wife, or the survivor of them, testified by any deed or writing under the hands and seals of them the said *Giwn Lloyd* and *Sarah Hill*, and the survivor of them, duly executed in the presence of two or more credible witnesses; and that the said lands, tenements, and hereditaments, when so purchased, and every part and parcel thereof, with their appurtenances, should be conveyed to them the said Sir *Watkin Williams Wynne* and *Edward Lloyd*, and their heirs, and to the survivor of them and his heirs, *to and for the use and behoof of the several persons, and for such estate and estates* as the premises thereinbefore mentioned, and thereby granted and released by the said *Giwn Lloyd* were conveyed, settled, limited, and appointed. And it was thereby also further declared and agreed that in case there should be no issue of the said intended marriage, and that the said *Sarah Hill* should be minded by her last will and testament to give or devise any sum not exceeding 4000*l.*, or the estate thereby intended to be purchased therewith, or any part thereof as aforesaid, to any person or persons whatsoever, it should be lawful to and for her the said *Sarah Hill*, notwithstanding her coverture, to give and devise the same, or any part thereof, to such person

or

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or persons, and to and for such estate and estates, and such uses, intents, and purposes, as she should limit, direct and appoint: and in such case they the said Sir *Watkin Williams Wynne* and *Edward Lloyd* should stand seised of all and every the lands, tenements, and hereditaments so to be purchased as aforesaid, to them and their heirs, to and for such uses, intents, and purposes, as she the said *Sarah Hill* should, by such her last will, limit, direct, and appoint; and then and from thenceforth all and every the uses and limitations to the said *Givn Lloyd* and his heirs, of and concerning the said lands, tenements, and hereditaments to be purchased as aforesaid, should cease, determine, and be absolutely void, to all intents and purposes whatsoever.

Givn Lloyd died in 1774, and *Sarah* his wife in 1782, intestate, and without having had any issue. *Catherine Lloyd*, the testatrix, continued in possession of the estate from the death of *Sarah Lloyd* until the time of her own death, in 1787. For the defendants, it was contended, that the legal estate was vested in Sir *W. W. Wynne* and *Edward Lloyd*, by the deed of 1746, and, consequently, that neither *Givn Lloyd* nor the testatrix had any legal estate; and, therefore, the lessor of the plaintiff could not derive any such estate from her. The learned Judge reserved the point, and the plaintiff having obtained a verdict, a rule nisi for entering a nonsuit was granted in *Michaelmas* term.

Taunton, Campbell, and Richards now shewed cause. There are three grounds upon which the Court ought to discharge this rule. First, by the words of limitation in the deed of 1746 the use was not executed in the trustees, but in the different persons to whose use the settle-

settlement was made. Secondly, there can be no doubt that it was the intention of the settler that the use should be executed in the parties beneficially interested, and the Court should put that construction upon the instrument which will give effect to the intention of the parties. Thirdly, the purposes of the trust having been at an end for more than thirty years, the Court will presume a reconveyance. As to the first point, it is clear, that if the settlement had stopped after giving the estates to Sir *W. W. Wynne* and *Edward Lloyd*, and their heirs, habendum to the use of them and their heirs, they would have had, not the use, but the seisin at common law ; and, therefore, although there are subsequent uses declared to other persons, those uses are not void, but are fed out of the common law seisin of the trustees. It must be admitted, that there can be no second use executed ; for the first set of uses is fed out of the first seisin, and there is nothing to feed the second set of uses. But the words of the statute are, " That where any person or persons stand or be seised of and in any honours, castles, &c. to the use, confidence, or trust of any other person or persons, &c., that in every such case such person and persons that have any such use shall hereafter be deemed and adjudged in lawful seisin, estate, and possession of the same honours, &c." Lord *Bacon*, in his reading on the statute of uses (a), observes, upon the word *other*, that the statute meant not to cross the common law, and that the word *other* was put in, meaning the divided use, and not the conjoined use. Again in p. 62. he says, " If I enfeoff *A.* to the use of his right heirs, *A.* is in the fee simple, not

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(a) Page 43.

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by the statute, but by the common law." And in p. 63. he says, "The whole scope of the statute was to remit the common law, and never to intermeddle where the common law executed an estate; therefore the statute ought to be expounded, that where the party seised to the use and the cestuy que use is one person, he never taketh by the statute, except there be a direct impossibility or impertinency for the use to take effect by the common law." *Jenkins v. Young* (*a*), reported also by the names of *Meredith v. Joans* (*b*), was decided according to this doctrine, which was also followed by this Court in *Doe v. Prestwidge* (*c*). The first use declared in the deed in question to the trustees was absorbed and extinguished in their seisin, and has no effect in preventing the operation of the statute upon the second set of uses. There is not, indeed, any case deciding, that where the estate is given to *A.*, to the use of *A.*, with a second limitation to the use of *B.*, then the second use is executed by the statute; but that necessarily follows, from the doctrine that *A.* is in by the common law, and not by the statute. *Tyrrel's case* (*d*) is the first in which it appears to have been decided that an use cannot be limited upon an use; but there the bargainee clearly took the legal estate by the statute, and not by the common law. *Hopkins v. Hopkins* (*e*) may be relied on for the defendant, where Lord *Hardwicke* said, that the statute of uses had had no other effect than to add, at most, three words to a conveyance; but the instance by which he illustrates that is of a limitation to *A.* and his heirs to the use of *B.* and his

(*a*) *Cro. Car.* 230.

(*b*) *Cro. Car.* 244.

(*c*) 4 *M. & S.* 178.

(*d*) *Dyer*, 155.

(*e*) 1 *Aik.* 581.

heirs,

heirs, in trust for *D. Lady Whetstone v. Bury* (*a*), and *The Attorney-General v. Scott* (*b*), certainly appear to be authorities against the present plaintiff; but in the former the terms of the settlement are not clearly stated, and the point in question was not there in judgment; in the latter it was clearly the intention of the parties that *Barker*, to whom the estate was in the first instance conveyed, should take the legal estate. In this case the intention is clearly the reverse of that, for if the legal estate remained in the trustees, *Givon Lloyd* could only have an equitable estate, even though the intended marriage never took effect, nor would the limitation to the wife operate as a legal bar of dower, for which purpose it was made. Again, the term created for raising portions would be merely an equitable term, which is manifestly contrary to the intention of the parties. The clause respecting the lands to be purchased with the wife's fortune is also important, for it appears to have been intended that they should go to the same persons as the other property, and it is clear that the trustees would not take the legal estate of the lands so purchased. Under such circumstances the Court ought so to construe the deed as to give effect to that which the parties doubtless did intend, viz. that the legal estate should go in succession to those parties in whose favour uses are declared, according to the doctrine of *Willes C. J.*, in *Parkhurst v. Smith* (*c*). But, lastly, if that cannot be done, at all events at this distance of time a reconveyance of the legal estate ought to be presumed, *Warren v. Greenville* (*d*); and if the Court see that the jury on

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(*a*) 2 P. W. 146.(*b*) *Cas. temp. Tabl.* 138.(*c*) *Willes*, 397.(*d*) 2 Str. 1129.

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another trial could only come to that conclusion, consistently with the facts of the case, they will not disturb the verdict found for the plaintiff.

Shadwell, Oldnall Russell, and E. V. Williams contra. The settlement in question is so obscurely drawn as to leave the intention of the parties altogether doubtful, and where that is the case, the words must have their ordinary legal effect. It is said that the legal estate was not intended to be vested in the trustees, because in that case there would be no legal jointure given to the wife in bar of dower, and no legal term to the trustees to raise portions. But if the legal estate were not vested in them, as there are no trustees to preserve contingent remainders, it would have been in the power of the first tenant for life to defeat all the contingent remainders, which clearly could not have been the intent of the parties. This is a sufficient answer to the argument arising out of the presumed intention. Then as to the legal effect of the words of the conveyance, it is impossible to find any substantial difference between this case and those which have already been cited, *Lady Whelstone v. Bury* (a), and *The Attorney-General v. Scott* (b); and in *Tipping v. Cousins* (c), a dictum of Lord Hale is quoted, that whether feoffees take by the common law or by the statute, yet where the use is once disposed of to them and their heirs, whether the statute executes it or not, there cannot be an use upon an use, nor a trust upon such use to be executed by the statute. *Robinson v. Comyns* (d) is to the same effect. The only remaining point is the presumption of a reconveyance; now at all

(a) 2 P. W. 146.

(c) C. & M. 312.

(b) Cas. temp. Talb. 138.

(d) Cas. temp. Talb. 164.

events the Court cannot act upon that, and if the lessor of the plaintiff relied upon it, the question should have been raised at the trial. But that could not be done, because it was inconsistent with the other argument that the legal estate never vested in the trustees. Nor is there any case to justify the presumption, unless the possession has gone in conformity with the presumption afterwards made, which it has not done in this case. Besides, the person under whom the lessor claimed was only in possession for five years, from 1782 to 1787; it was therefore most probable that no reconveyance was made to her; and according to *Doe v. Reed* (a), a jury ought not to find a reconveyance unless they really believe it to have been made.

BAYLEY J. I am of opinion that we ought not to make the rule absolute for entering a nonsuit, but that there should be a new trial in this case. Considering the length of time that has elapsed since the purposes of the settlement made by *Gwen Lloyd* were at an end, I think the question as to presuming a reconveyance of the legal estate ought to be submitted to a jury. The first point for our consideration is upon the construction of the settlement; for if it vested the legal estate in the trustees, then the lessor of the plaintiff had not the legal estate unless there had been a reconveyance. The limitation is to Sir *W. W. Wynne* and *E. Lloyd*, and to their heirs and assigns, habendum to them their heirs and assigns, to the only proper use and behoof of them their heirs and assigns upon certain trusts. I felt upon first reading it, that this was in a very singular form, and it appeared to me that the words "to the use and

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(a) 5 B. & A. 252.

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behoof of them their heirs and assigns," had been introduced by an accidental mistake, but I now think that they were introduced by design, but through ignorance. It is certainly singular that *Given Lloyd* should part with the legal estate immediately on the execution of the settlement, and that he and his wife should only be equitable tenants for life. It is also singular that the term created for the purpose of raising portions should be a mere equitable term, and that the lands to be purchased with the 4000*l.* should be limited in such a manner as to leave it doubtful whether or no the cestui que trust would take the legal estate. That would not necessarily be the case, for the direction, that the estate purchased should be limited "for such estate and estates" as the other premises, might mean for equitable estates; and, therefore, this is not absolutely inconsistent with the idea that the trustees were to take the legal estate. And on the other hand, the power which *Given Lloyd* and his wife would have had to defeat all the contingent limitations, if the trustees did not take the legal estate, shews so strong a purpose to be answered by construing the deed according to the strict legal operation of the language used, that I think we are not at liberty to put any other construction upon the words than that which they usually bear. Now, ever since I have belonged to the profession of the law, I have invariably understood that an use cannot be limited upon an use. That is admitted to be so in general, but a distinction has been taken where the limitation is to *A.*, to the use of *A.* in trust for *B.*, and it is said that then *A.* is in by the common law. That is true; but he is in of the estate clothed with the use, which is not extinguished, but remains in him. In th

case

case of *Meredith v. Jones*, cited in argument to shew that where an estate is limited to *A.*, to the use of *A.*, he is in by the common law, it is said, "for it is not an use divided from the estate, as where it is limited to a stranger, but the use and the estate go together." That case therefore shews, that although the trustees in this case might be in by the common law, yet they were in both of the estate and the use. There are two cases expressly in point. *Lady Whistone v. Bury* is a very clear case, and the words used were precisely the same as those found in the deed in question, and it was there decided, and also in *The Attorney-General v. Scott*, which came before Lord *Talbot*, one of the greatest real property lawyers that ever filled the office of Lord Chancellor, that the legal estate vests in him to whom by the words of the instrument the use is limited. Upon the authority of these two cases, I am of opinion that the use of the estate in question was executed in the trustees. Then, upon the other question, there is certainly some ground for presuming a reconveyance; but, on the one hand, I think the Court would be going a great deal too far were they to make such a presumption, and, on the other, I think the lessor of the plaintiff ought to have an opportunity of submitting that point to a jury. The rule should, therefore, be made absolute for a new trial.

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HOLROYD J. I agree with my Brother *Bayley*, that in this case there ought to be a new trial. Upon the first perusal of the deed in question I had no doubt that the legal estate was vested in the trustees, having always understood that an use cannot be limited upon an use; and although I was struck by the ingenuity of

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the distinction pointed out by Mr. *Taunton*, yet upon further consideration it appears to me that his argument does not warrant it. The argument is, that as the trustees did not in the first instance take to the use of another, but of themselves, they were in by the common law, and not the statute; that the first use was, therefore, of no effect, and the case was to be considered as if the deed had merely contained the second limitation to uses. But that is not so, for although it be true that the trustees take the seisin by the common law, and not by the statute, yet they take that seisin to the use of themselves, and not to the use of another, in which case alone the use is executed by the statute. They are, therefore, seised in trust for another, and the legal estate remains in them. As to the question of intention, even if it were intended that the deed should operate in a different mode from that pointed out by the law, when the legal estate is given to trustees, that intention cannot prevail the law. But the intention appears to me altogether doubtful; the absence of trustees to preserve contingent remainders affording a strong reason for supposing that the parties meant to give the legal estate to the trustees.

LITTLEDALE J. I am entirely of the same opinion. It is said, that by the construction now put upon the deed the intent of the parties will be defeated. If we were not construing a deed, I should feel disposed to give a liberal effect to the intention, but if all matters of convenience and inconvenience which raise a presumption of intention are to be taken into consideration, as affording rules for the construction of deeds, and are to have the effect of overruling the plain words of such instruments,
the

the law will very soon be thrown into utter confusion. Here, however, there is a balance of inconveniences, and therefore we may come at once to the legal construction of the settlement. I never entertained a doubt that a second series of uses could not be executed. It is true, that certain cases shew these trustees to have taken the estate by the common law, but they took it coupled with the use. The cases cited upon this point are perfectly clear, and they are well collected in a note, by Serjt. *Williams*, to *Jefferson v. Morton* (a). However, for the reasons given, I think that there ought, not to be a nonsuit, but a new trial.

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Rule absolute for a new trial.

(a) *2 Saund.* 11. n. (17).

The Company of Proprietors of the STAFFORD-SHIRE and WORCESTERSHIRE Canal Navigation against F. HALLEN, Gent., One, &c.

CASE against the defendant for digging clay-pits in his field adjoining to the bank and towing-path of the canal of the plaintiffs, in consequence whereof the bank slipped down, and the towing-path was rendered unsafe, and the plaintiffs incurred great expence in repairing the damage. Plea, not guilty. At the trial before Garrow B., at the Summer assizes for the

By an act of parliament a Canal Company were bound to repair the banks of the canal. In an action brought by the company against the owner of adjoining land for digging clay-pits upon

his own land, and causing the plaintiffs' banks to give way, there was some evidence to shew that the bank was not in good repair; but the learned Judge directed the jury to find for the plaintiffs, if they thought that the falling in of the bank was caused by the defendant's having dug clay-pits: Held, that the plaintiffs were not entitled to recover, unless at the time when the bank gave way it was in good repair, and that question not having been submitted to the jury, a new trial was granted.

county

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—
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against
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county of *Worcester*, 1826, the following appeared to be the facts of the case. The Plaintiffs were a company established by the stat. 6 G. 3. for making and maintaining the *Worcestershire and Staffordshire canal*. The defendant was the owner of land in the parish of *Kidderminster* in the county of *Worcester*, contiguous and next adjoining to the canal. In 1825 he caused clay-pits to be dug upon his own land near to and in the direction of the banks of the canal for fifty-five feet, without causing any injury to those banks. He then caused a clay-pit to be dug at the same distance from the bank, beyond the fifty-five feet, and in *July* 1825 that part of the bank of the canal which was contiguous and next adjoining to the land last excavated, gave way. The bank at this part of the canal consisted of sand. There was evidence to shew that it had not, at this place, been sufficiently puddled so as to prevent the water oozing through it and injuring the bank, but it was proved that the bank would have stood if the clay had not been dug from the adjoining land. The canal act enacted that the company should at their own charges divide, and separate, and keep constantly divided and separated the towing-paths on each side of the canal, and navigable trenches or passages, or such part or parts thereof as should be found necessary by the commissioners, with a sufficient post and rail, hedge, ditch, trench, *bank*, or other fence sufficient to keep in sheep and other cattle, to be set and made on the lands or grounds which should be purchased by, conveyed to, or vested in them from the lands or grounds adjoining to such towing-paths, and should at their own costs from time to time maintain and support the towing-paths, and the posts, rails, hedges, ditches, *banks*,

and

and other fences so set up and made as aforesaid, and also should, at their own charges, make and set up gates, bridges, and stiles over the hedges and fences, and all such gates, stiles, bridges, arches, and other conveniences so to be made, should from time to time be supported, maintained, and kept in sufficient repair by the company of proprietors. By another clause it was enacted, that nothing contained in that act should extend to defeat, prejudice, or affect the right of any lord of any manor, common, or waste grounds, or of any owner of any lands in, upon, or through which the said canal, towing-path, wharfs, quays, &c., or any of them, should be made, to the mines, minerals, or quarries, or to the salt springs, brine, or rock salt, lying or being within or under the lands to be set out or made use of for such canal, &c., or any of them; but all such mines, minerals, quarries, &c. were thereby reserved to the lords of such manors, common or waste grounds, or such owner or owners of such lands respectively, subject to the conditions and restrictions therein contained, to take and carry away to his or their own use, such mines, minerals, and quarries, not thereby injuring the canal.

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against
HALLEN.

It was urged to the jury by the defendant's counsel, upon the evidence, that the bank, at the time when it gave way, was not in a proper state of repair, and it was insisted that the act of parliament having required the company to keep the bank in repair, the proprietors of the adjoining lands were entitled to expect it to be so kept, and to work their lands to that extent which they might have done without injury to the bank, if it had been in a proper state of repair; that the defendant at all events had a right to dig as much clay from his own land as he might have done without injury

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injury to the plaintiffs if their bank had been in a sufficient state of repair, and if he dug no more in this instance, and the plaintiffs' bank gave way in consequence of his having dug clay to that extent, the falling in of the bank was caused, not by any *wrongful* act of the defendant, but by a breach of duty of the plaintiffs, viz. their neglect to repair their banks; that the company therefore could not recover for any damage resulting to them by reason of the defendant's having dug for clay upon his own land, if that damage would not have happened, provided they had done their duty and properly repaired their bank. The learned Judge directed the jury to find a verdict for the plaintiffs, if they were of opinion that the bank had fallen in, in consequence of the defendant's having dug the clay. A verdict having been found for the plaintiffs, *Campbell* in *Michaelmas* term obtained a rule nisi for a new trial, upon the ground that the learned Judge had not left the question to the jury, whether the injury would have happened if the bank of the canal had been in a sufficient state of repair. Upon the case coming on for argument on a former day, it was suggested by the plaintiffs' counsel that the learned Judge had, in fact, left that question to the jury. Mr. *Baron Garrow* now informed the Court that he had not left the question to the jury, whether the water would have escaped out of the canal if the bank had been in a good state of repair.

Oldnall Russell and *Holroyd* now shewed cause. The act of parliament only requires, that the banks of the canal shall be kept in a state of repair fit for all the public purposes for which it was intended, such as for towing
of

of barges, &c. Now, there is no pretence for saying that the bank was not in a state of repair adequate to all those purposes ; and if that be so, the plaintiffs have not been guilty of any breach of duty, and the injury was occasioned wholly by the wrongful act of the defendant.

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BAYLEY J. It appears to me that this case has not been properly presented to the jury. I think it ought to have been presented as a question of fact for their consideration, whether there was, at the time when the alleged cause of complaint arose, on the side of the canal such a bank as the act of parliament required the company to make, and the proprietors of the adjoining land were entitled to expect. Before the act of parliament passed, the latter were entitled to work their lands in any way they pleased, provided they did not, by so doing, injure the land of their neighbours in the state in which that land then was. The defendant, therefore, would have had an undoubted right to have dug in his soil the clay-pits, the digging of which is the ground of complaint in the present action. The act of parliament authorises the company to make a canal, and thereby introduces what may in some manner, with reference to the proprietors of the adjoining lands, be considered a dangerous species of property. But as the company are to have the benefit of a canal, they are required to make and support banks, and keep them in sufficient repair. They are, therefore, to make good and proper banks ; viz. banks adequate to keep the water in its channel, not only while the adjoining land shall remain in the state it was when the canal was made, but when

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when it shall be applied to those purposes to which it might have been applied by the proprietors before the canal was made. One of the modes of keeping good and proper banks is, by what is called puddling the banks. When the bank is composed of sand it is very pervious to water, and the effect of puddling is to render it impervious to the water. Here, the bank was composed of sand. Then, that being so, it was a question for the jury, whether this bank, made of those materials, was a fit and proper bank calculated to keep in that body of water; and if it were a proper bank, with reference to the materials of which it was composed, then it was a question for their consideration, whether effectual guards were made for the purpose of preventing the water from oozing out of its channel, and getting into and moistening, and thereby injuring the adjoining bank. The effect of the water oozing through the bank might not be such as to cause any mischief to the canal, so long as the land beyond the bank and the bank itself were on the same level. But when the land beyond the bank was made lower, (as it was in this case by digging,) the pressure of the water might cause it to ooze through, and gradually remove the bank in consequence of its having lost that support which it formerly had from the land on the other side. For these reasons I am of opinion, that this case ought to go down to another jury for the purpose of ascertaining, not merely whether the bank would have stood if the clay-pit had not been dug, (for upon that point I entertain no doubt,) but for the purpose of presenting to the consideration of the jury the second question: viz. whether the bank of the canal was such a bank (considering the materials of which

which it was composed, and the nature of the adjoining lands, and the rights of ownership thereon,) as the proprietors of those lands had a right to expect, and the company were bound to make and maintain; or, in other words, whether any mischief would have arisen from the act of the defendant if the bank of the canal had been in good repair.

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SEA FRODENBERE
Canal Co.
against
HALLIN.

HOLROYD J. I am of the same opinion. The Canal Company had no right upon the land on which this bank stood except under the act of parliament, and under the terms which that act of parliament imposes upon them. It has been argued that the act of parliament is satisfied if the bank is in such a state of repair as to be sufficient for all the public purposes for which it was intended. But as the act of parliament gives the company not merely a right of ownership over the banks on the side of the canal adjoining property belonging to other persons, but likewise imposes on them the obligation to keep the banks in proper repair, I think this must be considered an obligation on them to keep the banks in good repair, not merely for their own benefit, and the benefit of the canal of which they are proprietors, but for the benefit of other persons who have rights which are in some measure invaded by the powers given to the company by this act of parliament, and which otherwise the proprietors of this land would have had. If the act of parliament had not passed, and no canal had been made, the defendant would have had a right to dig in his land to any extent. I think he still has a right to do the same, and that the company have no right to complain of the injury that they have sustained; for they

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~~STAFFORDSHIRE
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they have not done that which it was incumbent upon them to do for the purpose of supporting their right to the canal. They have a bank there on condition of keeping it in repair. If they do not keep it in repair, then they, without performing the condition imposed upon them by the act of parliament, are invading the rights of other persons. Although the falling in of the bank might not have happened unless the defendant had dug clay, yet if it would not have happened if the bank was in good repair, which is a term imposed on the company by the legislature, they have no right of action. There was an obligation on the company to keep the bank in repair; and if the damage happened from their not performing their duty in this respect, and would not have happened if they had done their duty, there is no doubt that the action is not maintainable. It seems to me, therefore, in this case that there should be a new trial, inasmuch as upon this point there was some evidence (I do not say to what extent) which ought to have been, but was not, left to the consideration of the jury.

LITTLEDALE J. concurred.

Rule absolute.

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FORD against TILEY.

A SSUMPSIT for breach of an agreement to grant a lease of certain premises. At the trial before *Park J.* at the Spring assizes for the county of Gloucester 1826, the jury found a verdict for the plaintiff, with 300*l.* damages, as the estimated value of the lease; but liberty was reserved to the defendant to move to enter a nonsuit, upon an objection that the action was brought too soon. A rule nisi having been obtained for that purpose, the case was argued at the sittings in banc after *Trinity term 1826*, by *Campbell* against the rule, and *Ludlow* in support of it. The facts of the case, the arguments of counsel, and the authorities cited, are so fully detailed and commented upon in the judgment delivered by the Court, that it is unnecessary to state them here.

BAYLEY J. now delivered the judgment of the Court. This case came before the Court upon a motion to enter a nonsuit. It was an action for breach of an agreement to grant the plaintiff a lease. The agreement, dated the 3d *January 1824*, was, that the defendant should at the plaintiff's expence, with all possible speed after he should become possessed of or in possession of a certain public-house, execute a lease thereof, and also of a furnace which stood upon the premises, from the 21st *December 1825*, for fourteen or twenty-one years, 1825 subsisted, to grant any lease to *B.*, had committed a breach of his agreement, and was liable to an action for a breach of that agreement, although the first lease had not expired.

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years,

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years, if required by the plaintiff, at the yearly rent of 10*l.* It also bound the defendant to put the premises into good and tenantable repair, and to keep the roof in repair, and allow the water rents; and he was to have as the consideration 5*l.* down, and 100*l.* on the signing of the lease. The agreement also stipulated that if either party ran from the agreement, or did any thing to prevent the lease from being executed by all necessary parties, he should forfeit 200*l.* The declaration contained three counts, the first and second generally upon the agreement, the third for the penalty. None of them stated that the defendant had been either possessed or in possession, but the first stated that the defendant might have been possessed, but that he fraudulently prevented himself from becoming possessed, and deceitfully refused to take possession. The second stated that he neglected to execute the lease, and ran from the agreement, and prevented the agreement from being executed by the necessary parties. The third was generally that he had run from the agreement, and no lease had been executed. It appeared in evidence upon the trial, that at the time of the agreement the house was out upon a lease which would not expire till *Midsummer 1827*, and that the legal estate was vested in trustees in trust by lease or mortgage, to raise money to pay debts (which money was not wanted) and then in trust to receive and pay to *Betty Tyler 25*l.* per annum for her life*, with powers to her of entry and distress, and subject thereto (and to the lease or mortgage, if any, to raise money to pay debts) to the use of the defendant, if he attained twenty-four. On the 24th of *June 1825*, after the defendant had attained twenty-four, the defendant and the trustees joined in a new lease to Messrs. *Sims and Co.*,

in

in whom the former lease was vested, for twenty-three years, from 29th *September* 1825, and it was for his concurrence in this lease that this action was brought. It was objected at the trial, and the question was saved, whether the action was not premature, on the ground that the lease, which was in esse at the time of the agreement, would not have expired till *Midsummer*, 1827, and was still, as to these parties, to be deemed a subsisting lease; but though we are satisfied that that lease is, as between these parties, to be considered as subsisting, and that the defendant cannot hitherto have been taken to have been possessed, and has never had a right to have the possession, we are of opinion that the action is maintainable; because, by the lease of *June* 1825, the defendant has given up his right to have the possession, and has put it out of his power, so long as the lease of *June* 1825 subsists, to grant the lease he stipulated to grant. It is very true, the defendant may obtain a surrender of that lease before *Midsummer* 1827, and then he will be in a condition to grant the lease he stipulated to grant; but the obtaining such a surrender is not to be expected, and the authorities are, that where a party has disabled himself from making an estate he has stipulated to make at a future day, by making an inconsistent conveyance of that estate, he is considered as guilty of a breach of his stipulation, and is liable to be sued before such day arrives. In 1 *Roll. Abr.* 248. pl. 1. (8 *Vin.* 225.) it is said, "If a day be limited to perform a condition, if the obligor once disables himself to perform it, though he be enabled again before the day, yet the condition is broken, as if the condition be to enfeoff another before *Michaelmas*; if, before the ~~feast~~, he enfeoff another, though he after repurchases,

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yet he cannot perform the condition; and he cites *21 Edw. 4. 55*, where *Choke*, who was then one of the justices of C. B. so lays it down. The same may be collected from *Co. Litt. 221 b*, where, upon a feoffment on condition to re-enfeoff, on payment of a certain sum by the feoffor or his heirs before a certain day, a distinction is taken between a disability in the interim, on the part of the feoffor or his heirs, and a disability on the part of the feoffee, a removal of the disability before the day from the feoffor or his heirs, entitling them to require a re-infeoffment, and the removal from the feoffee being no saving to him of the consequences of a breach; and Lord *Coke* adopts *Littleton's* reason, "maintenant by disability of the feoffee the condition is broken; and the feoffor may enter." Now if the feoffment of a stranger before the day be a breach of a condition to enfeoff *J. S.* at a given day, the granting of a lease to a stranger before the day will be the breach of a contract to grant a lease to *J. S.* at a given day, and, à fortiori, will it be a breach so long as the lease to such stranger remains in force. In this case therefore, where the defendant has contracted to grant the plaintiff a lease as soon as he is possessed or in possession, and he will be entitled to the possession as soon after *Midsummer 1827* as *Betty Tyler* the annuitant shall die, and he has created a present disability in himself to grant such lease, if *Betty Tyler* shall die before the term to have been inserted in such lease would have expired, we are of opinion that the defendant's contract was broken by his joining in the lease of 1825; and, therefore, that the rule for a nonsuit cannot be made absolute. It appears to us, however, that the damages, to the extent to which they have been given, cannot be

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supported; and we think (unless the parties can agree) that there ought to be a new trial, that the rule by which the damages should be regulated may be more distinctly laid down to the jury. The damages upon the first count certainly cannot be supported, for that is founded upon the supposition, that the defendant might have been possessed if he would; whereas, without the consent of the trustees, he had no right at law to possess till *Midsummer 1827*, and the death of *Betty Tyler*. The second or third counts may be supported, in respect of that part of them which charges that the defendant has run from his agreement, because we think his destroying his chance of the right of possession is running from his agreement; but then the measure of damages should be, not the value of a lease for fourteen or twenty-one years, from *December 1825*, but the value of a lease for so much of that term, as, upon a calculation of the probability of the period of *Betty Tyler's* death, would be likely to be subsisting at the arrival of that period. The rule for a new trial must, therefore, be made absolute.

Rule absolute.

1827.

POAD
against
TILEY.

BOYLE *against* TAMLYN.

THE declaration stated that the plaintiff was possessed, and in the occupation, of a certain close of land in the parish of *East Down*, in the county of *Devon*, and that the defendant was possessed, and in occupation of

paired by the occupier of *B.*, sold *A.* to the plaintiff, and two years afterwards sold *B.* to the defendant: Held, that the latter was not bound to repair the gate, unless he or his vendor had made some specific bargain with the plaintiff to that effect; and that the doing of occasional repairs was not evidence of such bargain.

Where the owner of two adjoining closes (*A.* and *B.*), separated by a fence and gate, which had always been re-

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a certain other close of land, contiguous to and next adjoining to the close of the plaintiff, and divided therefrom by a certain fence, and in which fence there was and of right ought to be, a certain gate and gateway between the close of the plaintiff, and the close of the defendant: and the defendant by reason of the possession of his close, during all the time aforesaid, of right ought to have kept up and maintained, and still of right ought to keep up and maintain, the said gate between the close of the plaintiff and the close of the defendant, at all times of the year, in order that cattle lawfully feeding, or being in the close of the plaintiff, might not, for want of a sufficient gate between the plaintiff's close and the close of the defendant, escape from and out of the plaintiff's close into the close of the defendant, or into any other land or closes of any other person over and through the close of the defendant, and do any damage there, yet the defendant unjustly unhung, took, and carried away the said gate between the plaintiff's close and the close of the defendant, and suffered and permitted the gateway to be and remain without a gate thereto for a long space of time, whereby plaintiff's cattle escaped. Plea, not guilty. At the trial before *Littledale J.* at the Summer assizes for the county of *Devon*, 1826, the following appeared to be the facts of the case. The plaintiff was the owner and occupier of land called the *Deans*. The defendant was the owner and occupier of a field called *Dead Moor*, contiguous and next adjoining to the plaintiff's land called the *Deans*. They were separated from each other by a fence and gate situated on the defendant's land. The *Deans* and *Dead Moor* formerly belonged to one *Coffin*, and he, about thirty years ago, sold the *Deans* to *Thomas Boyle*, the father of the plaintiff, and

two

two years afterwards he sold the land called *Dead Moor* to the defendant. The gate in the fence was repaired by the tenant of *Dead Moor* while the whole belonged to *Coffin*. After *Boyle* had bought *Deans*, but before *Tamlyn* bought *Dead Moor*, the cattle belonging to the tenant of *Dead Moor* having trespassed upon *Boyle's* land, the latter sent to *Fry*, the then tenant of *Dead Moor*, and desired him to have the gate repaired, or *he* (*Boyle*) would impound his (*Fry's*) cattle. The gate was then repaired by *Fry*. Upon another occasion when the gate was out of repair, *Boyle* told *Tamlyn* that he must repair it, and *Tamlyn* did repair the gate. It was contended by defendant's counsel, there was no evidence to shew that the defendant was bound to repair the gate for the benefit of the plaintiff. The learned Judge thought there was evidence to go to the jury, but reserved liberty to the defendants to enter a nonsuit, in case there should be a verdict for the plaintiff. The learned Judge in his address to the jury said, that when the whole of the land belonged to *Coffin* he could be under no legal obligation to keep up a fence between the different parts of his own land, and that when he sold one field to the plaintiff, it did not, therefore, follow that he sold to him a privilege of having a gate or fence maintained by the vendor upon his own land for the benefit of the vendee, for that was not necessary to the enjoyment of the land, but that it might have been matter of specific agreement between the vendor and vendee. There was no obligation, therefore, to repair this fence when both closes belonged to *Coffin*, nor did any obligation necessarily result by reason of the sale of one of them to *Boyle*. If there was any, it must have been created by specific agreement between the parties,

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and when *Coffin* afterwards sold to the defendant the land called *Dead Moor*, that would not necessarily throw upon the latter the obligation to repair the fence for the benefit of *Boyle*. If any such obligation existed, that must have arisen also in consequence of some specific agreement between *Boyle* and *Tamlyn*. He then observed, that the principle of the cases relating to rights of way, or common, &c. did not apply strictly to the present; for, in the case of every user of a way or of a common, an act is done by one man upon the land of another, and unless it has been done with the acquiescence of the owner of the land, it must have been wrongful. The user of a way or a common for a long period, under circumstances which shew an acquiescence on the part of the owner of the land, raises an inference that the user has always been rightful, and affords evidence for a jury to make a presumption in fact, that there has been some grant or conveyance of the easement by the owner of the land, to the person who has so used his land. But, in this case, the defendant had in no instance allowed *Boyle* to do any act upon his the defendant's land; and he may fairly say, that he repaired the fence for his own benefit, and to prevent his own cattle from trespassing upon his neighbour's land. The learned Judge then observed, that if the jury thought that the fact of the occupier of *Dead Moor* having always repaired the gate, and having in two instances repaired it after notice from the plaintiff to repair, amounted to an admission on his part that he was bound to repair the fence for the benefit of the plaintiff, they might presume that there had been an agreement between *Boyle* and *Tamlyn* that the gate should be kept up by the latter for the benefit of the plaintiff, and that if they were of opinion that there was such an

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~~agreement~~ they should find for the plaintiff, otherwise ~~for~~ the defendant. The jury found that the defendant ~~was~~ bound by agreement to repair the gate. A rule nisi for entering a nonsuit having been obtained in last Michaelmas term,

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Merewether now shewed cause. There was sufficient evidence to go to the jury that an agreement had been executed, by which the defendant bound himself to repair the gate in question for the benefit of the plaintiff; and the question whether such an agreement had in fact been executed, was properly left to the jury. It was established that the gate had always been repaired by the owner of *Dead Moor*. The fact of its having been so repaired by him, raises a *prima facie* inference that he was legally bound to repair it, and throws upon the defendant the onus of shewing that the occupier of *Dead Moor* did not repair by virtue of a legal obligation. The question was submitted to the jury upon the evidence whether the gate was repaired by virtue of an agreement binding on the defendant to do it, and they came to the conclusion that there was such an agreement. Now if there was any evidence to go to the jury that the defendant was so bound to repair the gate, this verdict ought to stand, *Standen v. Standen* (a). The proof was that he always did repair, and that he repaired once after being told by the plaintiff that he the defendant *must* repair. That was evidence to shew that he repaired by virtue of a legal obligation. [*Littledale* J. Assuming that an agreement might be presumed, ought not the plaintiff to have alleged that the defendant was

(a) Cited in *Willison v. Payne*, 4 T. R. 469.

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~~Buller
against
Tawdry.~~

bound to repair by virtue of that agreement, and not by reason of his possession of the land.] It was sufficient for the plaintiff to allege that the defendant by reason of his possession was bound to repair, *Regina v. Sir John Bucknall* (a), *Cheetham v. Hampson* (b), *Star v. Rookesby* (c), *Anonymous* (d), and *Rider v. Smith* (e). In the latter case *Buller* J. said, “The distinction is between cases where the plaintiff lays a charge upon the right of the defendant, and where the defendant himself prescribes in right of his own estate. In the former case, the plaintiff is presumed to be ignorant of the defendant's estate, and cannot therefore plead it, but in the latter, the defendant knowing his own estate, in right of which he claims a privilege, must set it forth.” As to the general obligation to inclose land, in *Doyly v. Drake* (f), it was laid down by *Yelverton* and *Williams*, Justices, that a curia claudendâ lies by the vendee where the vendor sells two closes adjoining to another not severed, and does not make an inclosure, but this was denied by *Fenner* and *Popham*, Justices. But *Dyer*, 372 b. is an authority to shew that where A. and B. have adjoining lands (*there never having been any inclosure*) the one shall have trespass against the other on an escape of their beasts respectively. But in this case there was a fence dividing the *Deans* from *Dead Moor* at the time when the plaintiff purchased the former. He had a right, therefore, to expect that that fence which the owner or occupier of *Dead Moor* then maintained, should be repaired by him in future. In *Churchill v. Evans* (g), where two persons

(a) 2 *Ld. Raym.* 804.(b) 4 *T. R.* 518.(c) 1 *Salk.* 335.(d) 1 *Vent.* 264.(e) 5 *T. R.* 766.(f) *Moore*, 775.(g) 1 *Taunt.* 529.

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Ihad the concurrent possession of the same land for the purpose that each might take profits of a special nature distinct from but not inconsistent with the right of the other, *Lawrence J.* was of opinion that the one was bound to guard against casual damage, which, during and by the fair enjoyment of his right, might happen to the other; but *Mansfield C. J.* and *Chambre J.* were of a different opinion. There, each of the parties had distinct rights upon the same land; here, the parties had not any concurrent right on the land of each other. But one person being the owner of the whole, and having always repaired the gate, and having sold part to the plaintiff, the latter had a right to expect that the vendor would continue to repair it.

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against
Tanner.

Manning contra. The plaintiff claims an incorporeal right affecting the land of the defendant, viz. a right to have fences maintained at the defendant's expence, for his the plaintiff's benefit. Now the presumption of legal title, by grant or otherwise, to incorporeal rights in the lands of others, is founded on adverse possession, or the enjoyment of such rights for a period of twenty years, *Starkie on Evidence*, part 4. page 1214. There was not proof of any adverse enjoyment of the right claimed by the plaintiff, for it was not shewn that the gate was repaired in any one instance, in consequence of the plaintiff's having demanded as a right that it should be repaired solely for his benefit. Besides, where the possession or enjoyment can be satisfactorily accounted for, and is consistent with the fact of there having been no grant or conveyance, there is no ground for presuming one; and it is necessary that the jury should be satisfied that a conveyance of the right has in fact been executed;

CASES IN HILARY TERM

In d. Fenwick v. Reed (a), Livett v. Wil-
There was no ground for presuming that any
had in fact been executed in this case by the
of Dead Moor, to maintain at his own expence
for the benefit of the owner or occupier of the
plaintiff's land. The fact of the owner or occupier of
Dead Moor having repaired the gate does not afford any
ground for presuming that he was bound by covenant
with the plaintiff or his father to do so. Every man is
bound by law to take care that his beasts do not trespass
upon the lands of his neighbours. He may prevent
their doing so, either by employing others to keep them
within the limits of his own land, or by inclosing his land
with fences, so that the cattle cannot escape. Such an
inclosure may have the effect of preventing his neighbour's
beasts as well as his own from trespassing. But the making
or continuing such inclosure does not therefore raise
any inference that it was intended for the benefit of his
neighbour; because it is for his own benefit to prevent
his cattle trespassing on the lands of others. The fact
of the owner of the defendant's land having repaired
this gate can, therefore, be satisfactorily accounted for,
without supposing that he did so because he was bound
by any deed or agreement so to do; and if so, there is
no ground for presuming any grant or agreement to or
with the plaintiff by which he acquired a right to have
these fences maintained for his benefit, by the owner or
occupier of the defendant's land. There was no evidence
to shew that any of the repairs were made for the
benefit of the defendant. It was proved, indeed, that the
occupier of *Dead Moor* repaired on two occasions, after

(a) 5 B. & A. 232.

(b) 3 Bingsh. 115. -

notice

notice from *Boyle*. On the first occasion, however, he repaired in order to prevent his own cattle from trespassing; and on the second it did not appear what his motive for repairing was. Besides, assuming that there was some evidence to go to the jury that such an agreement existed, it must have been made within thirty years, and have been in the possession of the plaintiff; and as it conveyed a valuable right to him, it might fairly be expected that it would be carefully preserved. No such agreement having been produced, that circumstance ought to have been pressed on the attention of the jury, and they ought to have been directed to find for the defendant.

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BAYLEY J. There can be no doubt that the general rule of law is, that a man is only bound to take care that his cattle do not wander from his own land and trespass upon the lands of others. He is under no legal obligation, therefore, to keep up fences between adjoining closes of which he is owner; and even where adjoining lands, which have once belonged to different persons, one of whom was bound to repair the fences between the two, afterwards become the property of the same person, the pre-existing obligation to repair the fences is destroyed by the unity of ownership. And where the person who has so become the owner of the entirety afterwards parts with one of the two closes, the obligation to repair the fences will not revive, unless express words be introduced into the deed of conveyance for that purpose. So long, therefore, as *Coffin* continued to be the owner of *Deans* and *Dead Moor* also, all acts done by his tenant may be laid out of consideration; because it is quite clear, that during that period there could be no legal obligation on the occupier of *Dead Moor*

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Moor to repair; he must have repaired only for his own benefit. It appears, therefore, that within thirty years there was not any legal obligation on the owner or occupier of *Dead Moor* to maintain a fence for the benefit of the owner or occupier of the adjoining land; the obligation (if any such there be) must have arisen by deed within that period. Then the question is, whether the fact of *Fry* and *Tamlyn* having repaired the gates under the circumstances proved at the trial, ought to have induced the jury to presume that there had been a deed obliging the owner or occupier of *Dead Moor* to repair the same for the benefit of *Boyle*. That obligation must have been created either by the deed of conveyance from *Coffin* to *Boyle*, or by some subsequent grant or agreement between *Boyle* and the owner of *Dead Moor*. Now *Boyle* purchased *Deans* about thirty years ago, and if *Coffin* after that purchase was under any legal obligation to repair the gate, that would appear by the deed of conveyance to *Boyle*, which must have been in his own possession, and which, if it were in existence, might have been produced at the trial. If by any clause in that deed *Coffin* became bound to repair the fence, it would be conclusive in favour of the plaintiff's right to recover, but no such deed of conveyance having been produced, I think that the inference is, that *Coffin* did not bind himself, by the deed of conveyance to *Boyle*, to keep up the fence between the two closes. If there was proof of any such stipulation, I think it would support the allegation, that the defendant, by reason of his possession (a), was bound to repair. Such a right to have fences repaired by the owner of adjoining lands,

(a) See *Compton v. Rulands*, 1 Price, 27.

is in the nature of a grant of a distinct easement, affecting the land of the grantor. The authorities referred to, shew that it is usual in such cases to allege that the occupier of the land is by virtue of his possession bound to repair. Assuming, then, that the deeds of conveyance to *Boyle* were silent on the subject of repairing the fence, then the obligation to repair for the benefit of *Boyle* could only arise by some deed subsequently made between him and the owner of *Dead Moor*, by which the latter bound himself to repair the fence. If there ever was any such deed, it must have been in the possession of the plaintiff or his father, and it ought to have been produced at the trial ; or at least evidence ought to have been given to shew that it was lost or destroyed ; but no such deed having been produced, nor any evidence given of its being lost or destroyed, I think that, under the circumstances of this case, the fair inference is, that no such deed in fact ever existed. The improbability of such a deed having been executed ought, at all events, to have been presented strongly to the consideration of the jury ; and I think that they ought to have found for the defendant. But then it is said that there ought to be a nonsuit in this case ; however that cannot be if there was any evidence whatever to go to the jury, to shew that the defendant was bound to repair. Now the facts proved were these : *Boyle* purchased the *Deans* thirty years ago, and *Tamlyn* purchased *Dead Moors* about two years afterwards. *Fry* during those two years having continued the tenant of *Coffin*, repaired the gate. It appeared that applications were made by the plaintiff to the occupier of *Dead Moor* to repair. On the first occasion the tenant was told, that if he did not repair, and his cattle trespassed on the plaintiff's land, he would impound them. On the other occasion

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occasion the defendant was merely told that he, the defendant, must repair, but he was not told on either occasion, that if he did not repair, and the plaintiff became damaged in consequence of his cattle trespassing upon the lands of other persons, that he, the plaintiff, should look to compensation from the occupier of *Dead Moor*. The fact, therefore, of his having repaired upon these two occasions, did not distinctly shew that he did so by virtue of his being under any legal obligation to the plaintiff so to do. But still it appears to me that there was some (though very slight) evidence to go to the jury, that the defendant was bound to repair; for the fence might be considered a mutual benefit to the plaintiff and the defendant, and if that were so, unless one of them were bound by law to repair at his own expence, it might fairly be expected that each would contribute to the repairs; but the proof was, that the gate was always repaired at the expence of the occupier of *Dead Moor*; that fact afforded some evidence, though very slight, that the latter was bound to repair. Upon the whole, therefore, I am of opinion that the rule ought to be made absolute for a new trial; but as the weight of evidence appears to me to have been greatly in favour of the defendant, it ought to be without costs.

HOLROYD and LITTLEDALE Justices, concurred.

Rule absolute for a new trial.

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The THAMES Tunnel Company against SHELDON.

THIS was an action brought to recover the sum of 80*l.*, being the amount of two calls of 5*l.* each on **eight** shares in the capital stock of the said company. **A**t the trial before Abbott C. J. at the *London* sittings after *Michaelmas* term 1826, a verdict was found for the plaintiffs, subject to the opinion of this Court upon the following case :

Early in the year 1824 it was proposed to construct a tunnel under the river *Thames*, near *Bermondsey*, and a subscription was accordingly opened for that purpose, to be divided into shares of 50*l.* each, upon which a deposit of 2*l.* per share was required to be paid in advance, for and towards the expences of applying to parliament for an act to incorporate the company, and carrying the intended work into execution. The defendant applied for eight shares in the intended capital of the company, and that number of shares was set against his name accordingly ; and he then gave a check

By an act of parliament, passed for making a tunnel under the *Thames*, the company of proprietors were enabled to raise a sum of 200,000*l.* for the purpose of making the tunnel, and it was enacted, that the persons who had subscribed or who should thereafter subscribe, or advance any money towards making the tunnel, should pay the sums by them respectively subscribed at such times and places, and in such manner as should be directed by

the directors, and in case any of such subscribers should neglect to pay the same at the time and place, and in manner so required for that purpose, the Company, or their directors, were empowered to sue for and recover the same. By another section, reciting that the probable expences would, according to the estimate thereof, amount to 160,000*l.*, and that the sum of 140,000*l.*, being more than four-fifth parts of such expences, had already been subscribed for defraying such expences by several persons, under a contract binding them, their heirs, executors, and administrators, for payment of the several sums so subscribed by them respectively, it was enacted, that the whole of the sum of 160,000*l.* should be subscribed in like manner before any of the powers and provisions given by that act should be put in force :

Held, that the word " subscriber " in this act of parliament applied only to those who had stipulated that they would make payment, and not to all those who had already advanced money, and, consequently, that a person whose name was mentioned in the recital of the act of parliament as one of the original proprietors, and who had paid a deposit on eight shares, but who had not signed any contract, was not a subscriber within the meaning of the act, and not liable to be sued by the directors.

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company, and enabling them to execute the tunnel and other necessary works, and the name of the defendants inserted in the act as one of the company. The sum authorized to be raised by the company was £200,000. By the 91st section of the act, after reciting that the probable expences would, according to the estimate thereof, amount to £160,000., and that the sum was £141,000., being more than four-fifth parts of the expences, had already been subscribed for defraying such expences, by several persons under a power binding them, their heirs, executors, and administrators for payment of the several sums so subscribed by them respectively, it was enacted that the whole of the sum of £160,000. should be subscribed in like manner before any of the powers and provisions given in the act should be put in force.(a) A petition was presented

(a) The following sections of the act were referred to.

The first section, which recited that the persons therein mentioned were willing and desirous, at their own expence, to make and maintain a tunnel; and then enacted that the several persons therein mentioned (the defendant being one), together with such other person or persons as are or hereafter shall become possessed of any share in the said tunnel, or have agreed to subscribe for the same, and their successors, executors, &c., should be a body politic and corporate for making the tunnel.

to the House of Commons praying for leave to bring in a bill for the purposes proposed by the subscription, which the clerk to the company stated at the trial he had reason to believe was not signed by the defendant.

The contract mentioned in the 91st section of the act was signed to the extent of more than the sum of 160,000*l.* before any proceedings were taken in execution of the act. Before the passing of the act, the contract was left at the company's office for the signatures of the subscribers, but was not signed by the defendant, although his name was mentioned at the foot of it as a subscriber for eight shares, and a space left opposite each subscriber's name for his signature and seal thereto. A short time after the act of parliament had passed, when the company were procuring additional signatures and seals to the contract for completing the said amount to 160,000*l.*, the defendant, on being then applied to, refused to execute the contract, alleging that he had sold his shares in the concern, but no evidence of the sale of such shares was given by the defendant; nor did the defendant give any evidence whatever at the trial.

The works authorized by the act being in progress, the calls for which this action was brought became necessary. They were duly made and advertised.

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raise and contribute. The third section enacted that the shares should be deemed to be personal estate. The fourth section, that every person who should by virtue of the act have subscribed, or undertaken for two or more shares in the said undertaking, should have a vote or votes as therein mentioned. Section 25. is stated at length in the judgment of the Court. By section 32. it was enacted, that after a call, no share should be transferred until such call should have been paid.

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Notice of them respectively was given to the defendant, from whom they were severally demanded, but neither of them has been paid.

D. Pollock for the plaintiff. The defendant was a subscriber for or proprietor of shares within the meaning of this act of parliament. He is one of the persons named in the first section of the act, and who in the preamble are stated to be persons willing and desirous to construct the intended works at their own expence. There are no cases to be found applicable to this. The only case bearing upon the present is *The Bristol and Taunton Canal Company v. Amos* (a), where at the trial of the cause at Nisi Prius Lord *Ellenborough* was of opinion that the insertion of the defendant's name in the first section of the act as one of the corporation, was proof that he was the proprietor of one share at the least, and a verdict was taken accordingly. The defendant relies here upon the 91st section, but the act contemplates two descriptions of subscribers, those who merely subscribed for shares in the undertaking, and those who to comply with the requisition of the 91st section, which is introduced entirely for the security of the public, were willing to bind themselves and their heirs, executors, and administrators by a contract deed. The whole number of subscribers was to be to the extent of 200,000*l.*; these special subscribers were to be to the extent of 140,000*l.* Shares are declared by the act to be personal estate, and that upon clearing up all calls then due, the subscribers should have power to

(a) 1 M. & S. 569.

sell

sell and transfer their shares, and upon such transfer being registered, the vendors of such shares should by the 92d section of the act from thenceforth be completely exonerated from all future calls in respect of such shares. But with regard to those subscribers who execute the deed, they would not be so exonerated, but if the vendee of their shares failed to pay future calls, they would be liable under their deed to make good the deficiency. Now if no one be a subscriber within the meaning of the act unless he has executed the contract as contended for on the part of the defendant, the provision in the 92d section of the act before alluded to would be completely inoperative. Besides, the word "subscribe" in the act, is clearly not to be confined to a signature to the contract, for by the 23d section those persons are subjected to the payment of calls "who have subscribed or who shall hereafter subscribe or advance money." Those persons, therefore, who like the defendant had subscribed money upon shares by paying a deposit, became proprietors of shares upon the incorporation of the company, although they had not executed the contract deed. Such a subscription would have enabled them to claim the shares upon which they had paid their deposit, had the undertaking been prosperous, and they ought not to be permitted to withdraw upon a supposition that it is otherwise. It would be a great hardship upon those who have bona fide continued subscribers, with a view to the completion of the undertaking that the funds upon which they relied, and justly relied, for assistance, on the ground that the parties had paid a deposit, or in the words of the act "subscribed," should now be withheld.

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A a 3 drawn,

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drawn, on the plea that not being parties to the deed, they were not subscribers to the undertaking at all. The sole object of the 91st section appears to be, to prevent the undertaking from being abandoned, when partly executed, whereby the public might be very much inconvenienced, by requiring that out of the body of subscribers, a sufficient number should be found who would bind themselves to the extent of the estimate of the works, before the undertaking should be commenced, so as to guarantee to the public the due execution of the tunnel; but it could not be the intention of the legislature, to enable those who had subscribed towards the remainder of the capital authorized to be raised, to continue proprietors or to abandon their shares, at their own option, merely because they declined to subscribe the contract.

Patteson, contrà; adverted to the 91st section, and contended that the meaning of the word *subscribe* was defined by that section, and that it applied to those persons only who had signed a contract, and not to persons who had merely advanced money. He was then stopped by the Court.

BAYLEY J. This action is brought on the twenty-third section of the act of parliament, and we must therefore see whether the defendant has or has not brought himself within it. The words of that section are, "that the respective persons who have subscribed, or who shall hereafter subscribe *or* advance any money for and towards making and maintaining the said tunnel, shall, and are hereby required to pay the sums by them respectively

respectively *subscribed* at such times, and in such manner as shall be directed by the directors ; and in case any of such *subscribers* shall neglect to pay the same at the time and place, and in manner so required for that purpose, the said company or their directors are hereby empowered to sue for and recover the same." Now the case turns upon the word *subscriber*, and the question is, whether within the meaning of that term, as used in this act of parliament, the defendant has become a subscriber or not. In order to fix him it must be made out that he has *subscribed*, and *subscribed* money ; but then the question is, what is meant by the word *subscribe* there used. Does it mean actual payment ? That is one meaning of the word. If I give towards any particular purpose a sum of money, I may be said to *subscribe* that sum, or if without paying the money I put down my name binding myself to contribute, then I become a *subscriber* to the amount of that money which I, by that signature, state that I will contribute. Now, in which of these two senses is the word *subscribe* used in this clause ? Is it applicable to persons who have advanced money, or is it applicable to those persons stipulating for a future advance of money ? Now, looking at the whole of the clause, it is evident that it applies not to those who have actually made a payment, but to those who have stipulated that they will make a payment ; for, by the latter part of the clause it is provided, that in case any part of the *subscribers* neglect to pay, the company are empowered to sue for and recover the same. That must, of necessity, mean the money which they bound themselves to pay. The ninety-first section uses the word *subscribed* in the same sense. It recites that the probable expences of making the tunnel will amount

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to the sum of 160,000*l.*, and that the sum of 140,000*l.*, being more than the four-fifth parts of such expences, had already been subscribed for defraying such expences by several persons under a contract, binding them, their heirs, executors, and administrators, for payment of the several sums so subscribed by them respectively. The word *subscribed* in this clause clearly applies only to persons who have bound themselves by a contract that they will pay hereafter, and not to those who had actually made the advances. The next sentence provides, "that the whole sum of 160,000*l.* shall be subscribed in like manner before any of the powers and provisions given by that act shall be put in force;" that is, not that it shall be paid, but that there shall be names put down for that purpose. Upon these two clauses, therefore, there can be no doubt that the word "subscribed" as there used, applies to a man who puts down his name to a contract, by which he binds himself to contribute to the extent of the number of shares for which he puts down his name.

It has been suggested, that there is a distinction in this act of parliament between subscribers to the extent of 140,000*l.* and subscribers beyond that sum; that the former class of subscribers are to sign the contract, and to bind themselves, their heirs, executors, and administrators; and that the latter class are not bound to come under any such obligation. Now, if any such distinction had been contemplated by the framers of this act, it might fairly be expected that it would have been clearly pointed out, but no such distinction is to be found. The object of the legislature is manifest. There is to be raised one gross sum not exceeding 200,000*l.*, and the whole of that is to be applied

plied to those purposes mentioned in the recital of the ninety-first section. The legislature require an estimate of the expence to be laid before them, and that four-fifths of that estimated amount should be subscribed before the passing of the act, as a pledge to the subscribers that there is an available fund to that extent. But when that sum is once subscribed, as a larger sum may be required, a power of raising money beyond that amount is given. I think the true construction of the act of parliament is, that every original proprietor, whether he be named in the act of parliament or not, is to stand exactly upon the same footing. He is ultimately to decide whether he will, and to what extent he will become a subscriber. When he puts down a sum of money before hand for certain shares, he thereby specifies the number of shares for which he is willing, upon this view of the subject at that time, to become a subscriber, and he may be guilty of a breach of faith, if he does not take up shares to that amount; but according to the provisions of this act of parliament that is to be a matter of subsequent arrangement. The second section enables the company to raise among themselves a sum not exceeding 200,000*l.*, such sum to be divided into shares of 50*l.* each, and such shares are to be vested in the several persons so subscribing, and their successors, to their and every of their proper use and benefit, proportionably to the sums they shall severally raise and contribute; and they were to advance among themselves a sum not exceeding 200,000*l.*: and every person subscribing is to have shares in proportion to the sum he subscribes. Then the fourth clause, which regulates the number of votes which every person who has previously subscribed for two or more shares shall have,

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seems to me to contemplate, not that the parties are actually bound unless they have signed the previous subscription, but that they shall be at liberty, if they have not signed the subscription, to make an arrangement to the extent to which each shall contribute and have shares. It enacts, that every person who shall by virtue of this act have subscribed or undertaken for two or more shares, shall have such and such votes. Now, who can be considered as having subscribed by virtue of this act, except those persons who have signed that contract which is specified in the ninety-first section? There is no other description of subscribers alluded to in any other part of the act, and that section imports that there has been a subscription of 140,000*l.* only, and not beyond that amount. The meaning of this is, that if any person who shall by virtue of that act, namely, by virtue of having entered into this arrangement, as one of the subscribers to the amount of 140,000*l.* be said to have subscribed or undertaken for two or more shares, then he shall have such and such votes. It seems to me, that the true construction of the act of parliament is, that no man is to be deemed a subscriber who shall have advanced his deposit towards defraying the expences of the act, unless he has signed that contract, which, according to the ninety-first section, is to describe the number of shares he has subscribed for. A man who advances money towards obtaining an act of parliament ought to be considered as entitled to a locus penitentiae after the act is passed. He may like the scheme in general, but he may not like it with the particular provisions introduced by this act. For these reasons I am of opinion, that the defendant is not to be deemed a subscriber, so as to come within the operative part

part of the twenty-third section, and, consequently, that
action cannot be maintained.

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HOLROYD and LITTLEDALE Js. concurred.

Judgment for the defendant.

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Cook against LEONARD and Another.

THIS was an action for assault and false imprisonment. Plea, not guilty. At the trial before Burge J., at the Summer assizes for the county of Worcester, 1826, the following appeared to be the facts of the case: The defendant, *Leonard*, was one of the constables of the parish of *Stroud*, and the other defendant was surveyor to the commissioners under an act of parliament for improving the town of *Stroud*. On the 16th of February two foreigners came to the town with a dromedary and some monkeys, which they exhibited about the streets, beating a drum and soliciting money from the crowd. One of the foreigners, while he was exhibiting the animal in the streets, was taken into custody by the high constable, who was also a commissioner under the act for paving and lighting the town of *Stroud*. The latter afterwards ordered the defendant, *Leonard*, to cause the dromedary and monkeys to be removed out of the town. But before this order could be carried into effect, the other foreigner had removed the dromedary from the street into a stable. *Leonard*, assisted by the other defendant, went about five o'clock to the stable where the dromedary was, and desired the other foreigner to take it out of the town. The plaintiff, who was present, advised him

A statute enacted that no plaintiff should recover in any action commenced against any person for any thing done or performed in execution or under the authority of the act, unless notice thereof in writing should be previously given twenty-eight days before the commencement of the action: Held, that a notice was necessary in those cases only in which the party against whom the action was brought had reasonable ground for supposing that the thing done by him was done in execution of or under the authority of the act.

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him not to do so, alleging that the defendant had no authority to order him to do so. The defendant, *Leonard*, then took hold of the halter of the dromedary in order to remove it, upon which the plaintiff attempted to prevent him: upon this defendants committed the assault upon the plaintiff, and imprisoned him. By an act of the 6 G. 4. s. 68. for paving, lighting, watching, regulating, and improving the town of *Stroud*, the commissioners therein appointed were empowered to cause the streets to be watched, and to appoint watchmen and patrol. By section 69. it was made lawful for the watchmen and patrolmen to apprehend and secure in some proper place all rogues, vagabonds, vagrants, idle and disorderly persons, disturbers of the public peace, prostitutes, and all suspected persons who should be found wandering or misbehaving themselves *during the hours of keeping watch* within the limits of the said town. By section 70. all such watchmen or patrolmen were to be sworn in as *constables*, and they were thereby invested with the like powers and authorities, privileges and immunities, as any constables were invested with or enjoyed by law. By section 111. it was enacted, "that no plaintiff should recover in any action commenced against any person for any thing done in execution of or under the authority of that act, unless notice in writing should be previously given to the person intended to be sued twenty-eight days before such action should be commenced." *Burrough J.* was of opinion that the defendants having acted under a colourable authority of the act were entitled to notice of action, and no such notice having been given, *the plaintiff was nonsuited*. A rule nisi having been obtained for setting aside that nonsuit in last *Michaelmas term*,

Ludlow

Ludlow now shewed cause. The defendants were entitled to notice of action. It is sufficient for that purpose to shew that they acted in supposed pursuance of the act of parliament, and with a bona fide intention of discharging their duty, *Theobald v. Crichmore* (a). Now here the owners of the dromedary had by the exhibition of the animal in the public streets created a nuisance. The defendants were ordered by the high constable to remove that nuisance, and if they had found the dromedary in the street causing the nuisance, they would have been justified in removing it either by the common law or by the 99th section, which declares the exhibition of such an animal to be a nuisance; but they attempted to remove it from the stable where it was no longer a nuisance, and in that respect they acted illegally; but at the same time it is clear that they supposed they were acting in execution of their duty. By the 69th section they might have apprehended the owners of the dromedary as idle and disorderly persons; they were not justified under that section in attempting to remove the dromedary, but they bona fide thought they were.

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BAYLEY J. I think this case admits of no doubt. Where a statute gives protection to persons acting in execution, or in pursuance of it, all persons acting under its provisions are entitled to that protection, although they exceed their authority by so doing. There must, however, be some limits to that rule, and it seems to me that there are cases which warrant this distinction. If an officer does any act, part of which is, and part of which is not, authorized by the statute; or if a magistrate

(a) 1 B. & A. 227.

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act in a case which his general character authorizes him to do, the mere excess of authority in either case does not deprive the officer or magistrate of that protection which is conferred upon those who act in execution of it; but where there is a total absence of authority to do any part of that which has been done, the party doing the act is not entitled to that protection. There are certainly some strong cases where magistrates, acting beyond the limits of their authority, have been held to be within this protection. Thus it has been held that a magistrate acting upon the subject matter of complaint brought before him, though it arise out of his jurisdiction, is entitled to notice of action; but in that case the act of parliament would have authorized him to do the act he did, provided the subject matter of complaint had arisen within his jurisdiction. In *Weller v. Toke* (a) one magistrate having committed the mother of a bastard child for not filiating the child, it was held that he was entitled to the notice under the 24 G. 2. c. 44., though by the statute of Eliz. c. 43. s. 2. jurisdiction over the subject matter was committed to two magistrates. In *Bird v. Gunston* (b) the act of parliament authorized the magistrate to commit a driver of a cart for riding on the shafts in the highway. The magistrate committed the party for being on the shaft while the cart was standing still; it was held, that although the commitment was illegal, the justice was entitled to notice of action. These cases fall within the general rule applicable to this subject, viz. that where an act of parliament requires notice before action brought in respect of any thing done in pursuance or in ex-

(a) 9 East, 364.

(b) 24 G. 3.

cution

cution of its provisions, those latter words are not confined to acts done strictly in pursuance of the act of parliament, but extend to all acts done bona fide which may reasonably be supposed to be done in pursuance of the act. But where there is no colour for supposing that the act done is authorized, then notice of action is not necessary. Thus, in *Lawton v. Miller* (a), a custom-house-officer seized a man going abroad, thinking he was an artificer. It was admitted that a custom-house-officer had no right to seize an artificer, but it was contended that he was entitled to notice of action. A verdict was found for the plaintiff, with liberty to the defendant to move to enter a nonsuit, and upon motion the Court refused the rule. In *Morgan v. Palmer* (b) the mayor of Yarmouth, who was also a justice, exacted from a publican a fee of 4s. upon renewing his licence; the latter brought an action to recover it back, but it was held that the fee was not taken in discharge of the official duties of the mayor as magistrate, and therefore that he was not entitled to notice. Then to apply the principles to be collected from these cases to the present. Had the defendant in this case any colour for acting as he did? Had he any reasonable ground for supposing that he was acting in pursuance or execution of the act of parliament? By the act of parliament the commissioners are authorized to appoint watchmen and patrolmen. By section 69. the latter are authorized to apprehend all vagrants, and all suspected persons, who shall be found wandering or misbehaving themselves during the hours of keeping watch within the limits of the town. The defendants did not attempt to appre-

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(a) *Easter*, 1818. MSS.

(b) 2 B. & C. 729.

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<sup>Constituted
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Law.</sup>
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held the owners of the dromedary, but the ~~plaintiff~~ ~~had~~ ~~been~~ ~~entitled~~ ~~to~~ ~~recover~~ ~~the~~ ~~damages~~ ~~for~~ ~~the~~ ~~removal~~ ~~of~~ ~~the~~ ~~dromedary~~. This they were clearly not entitled to do under the clause of the act. But by the 99th section the ~~plaintiff~~ ~~had~~ ~~been~~ ~~entitled~~ ~~to~~ ~~recover~~ ~~the~~ ~~damages~~ ~~for~~ ~~the~~ ~~removal~~ ~~of~~ ~~any~~ ~~beast~~ ~~in~~ ~~the~~ ~~streets~~ ~~subjecting~~ ~~the~~ ~~person~~ ~~exhibiting~~ ~~it~~ ~~to~~ ~~a~~ ~~penalty~~. Now in this case the ~~plaintiff~~ ~~had~~ ~~been~~ ~~entitled~~ ~~to~~ ~~recover~~ ~~the~~ ~~damages~~ ~~for~~ ~~the~~ ~~removal~~ ~~of~~ ~~the~~ ~~dromedary~~. During the day-time had been parading the streets with the dromedary removed it into a stable. These two defendants, the one a police-officer, and the other having authority to assist him, went to this stable ~~with~~ ~~the~~ ~~intention~~ ~~of~~ ~~removing~~ ~~the~~ ~~dromedary~~. But having been removed from the street to the stable before the defendants attempted to seize it, it had ceased to be a nuisance, and the defendants, therefore, had no ~~intention~~ ~~of~~ ~~removing~~ ~~the~~ ~~dromedary~~ under this act of parliament for removing things from the stable. Where an act of parliament says, that in the case of an action brought against any person for anything done in pursuance or in execution of the act, such defendant shall be entitled to certain privilege, the meaning is, that the act done must be of that nature and description that the party doing it may reasonably suppose that the act of parliament gave him authority to do it. I think that in this case the defendants had no reasonable grounds for thinking that the act of parliament gave to them, or to the commissioners under whose authority they acted, any power to remove the dromedary from the place where it was at the time when they attempted to remove it, and that being so, I am of opinion that the rule for a new trial must be made absolute.

HOLROYD J. I am also of opinion, that notice of action was not necessary in this case. If the defendants had been acting under colour of the authority of the act of parliament, or if they had authority to do the act

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complained of, and had overstepped their authority in the course of doing it, they would have been entitled to notice of action; but looking at the terms of this act of parliament, I am of opinion that these defendants had no pretence or colour for supposing that they were acting under the authority of the act. The ninety-ninth section subjects persons committing certain acts in the street to a penalty of 5*l.*, and it subjects to this penalty, among other things, "any person who shall, within any street of the town, exhibit or expose any stallion, or turn loose any horse, mule, ass, pig, or other beast." Now, I think that this clause of the act not only did not justify the defendants, but did not afford them any colour or pretence for what they did. If they had done the act they did during the *hours of watch*, and during the time the dromedary was exhibited in the streets, so that it might be considered a nuisance, there might have been some colour or pretence for what they did. For, if it was a nuisance, they might, either under the authority of this act of parliament, or the authority of the common law, have removed it, for they were constables of the town or police-officers; but here they attempted to seize the dromedary after it had been removed from the street to a stable, and after it had ceased to be a nuisance. In *Irving v. Wilson* (a) a revenue officer seized goods as forfeited, and took money of the owner for releasing them; the latter having brought an action to recover back the money, it was held that notice of action was not necessary, and it was laid down by *Grose* J., that if an officer seize goods as forfeited, he does it *colore officii*; but if he takes money

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(a) 4 T. R. 485.

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for delivering up the goods, there is no pretence for saying, that he does that colore officii. *Morgan v. Palmer* (a) is an authority to the same effect. In this case, if the officer had attempted to remove the dromedary at the time it was obstructing the street, I should have thought that although he might not have been strictly justified in doing it, still it would have been an act done colore officii; but as soon as the dromedary was removed to a stable it no longer constituted a nuisance, and the taking it from that stable was not an act done colore officii, for the defendants could have no reasonable ground for supposing that they had any authority under the act of parliament to do it. In order to entitle the defendants to notice, they ought to have had a colourable authority for removing the dromedary. I am, therefore, of opinion, that the rule for a new trial must be made absolute.

LITTLEDALE J. I am of the same opinion. If the defendants had derived from this act of parliament any colour for doing the act in question, although they might have acted illegally, they would have been entitled to notice of action. The sixty-ninth section limits the time during which the persons there described as misbehaving themselves can be apprehended, viz. the hours of watch. Here, it does not appear that the attempt to seize the dromedary was made during the hours of watch. But even if that were so, this clause enables the watchmen and patrolmen to apprehend *persons*, not animals, and persons misbehaving themselves. I think, therefore, under this

(a) 2 B. & C. 729.

clause,

clause, the defendants had no ground for supposing that they were entitled to seize the *dromedary* at the time when they attempted so to do. Considering the time limited for apprehending offenders, the nature of the offence described in the act of parliament, and the offenders, I think that the defendants had no colour for supposing that they were authorised under this clause to do the act which they did. Then, as to the ninety-ninth section, it is sufficient to observe, that the dromedary was not in the streets at the time when the defendants attempted to remove him, and I doubt much whether the exhibition of the animal in the streets would have been nuisance within this clause of the act of parliament; but I am clearly of opinion, that in this case the commissioners had no authority to remove the dromedary after it had been placed in the stable, and, of course, that the defendants who acted under them, had none. I think, also, not only that they had no authority, but that they had no colour or reasonable ground for supposing that they had authority to act as they did; and, consequently, the rule for a new trial must be made absolute.

Rule absolute.

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JAMES TARLING against BAXTER.

A., on the 4th of January, agreed to sell to *B.* a stack of hay for the sum of 145*l.*, to be paid on the 4th of February, the same to be allowed to stand on *A.*'s premises until the 1st of May. *B.* stipulated that the hay should not be cut until it was paid for: Held, that this was a contract for an immediate and not a future sale, and that the property in the hay passed by it immediately to the vendee, and that the same having been subsequently destroyed by fire, the loss fell upon him.

ASSEMBLED to recover back 145*l.* paid by the plaintiff to the defendant's use. The declaration contained counts for money had and received, and the other common counts. Plea, general issue, with a notice of set-off for goods sold and delivered and gained and sold. At the trial before *Abbot C. J. Scott* at the London sittings after Hilary term, 1826, a verdict was found for the plaintiff for 145*l.*, subject to the opinion of this Court on the following case.

On the 4th of January 1825, the plaintiff brought to the defendant a stack of hay belonging to the defendant, and then standing in a field belonging to the defendant's brother. The note signed by the defendant, and delivered to the plaintiff was in these words: "I have this day agreed to sell James Tarling a stack of hay, standing in Canonbury Field, Islington, at the sum of one hundred and forty-five pounds, the same to be paid on the 4th day of February next, and to be allowed to stand on the premises until the first day of May next." And the following note was signed by the plaintiff, and delivered to the defendant. "I have this day agreed to buy of Mr. John Baxter, a stack of hay, standing in Canonbury Field, Islington, at the sum of 145*l.*, the same to be paid on the 4th day of February next, and to be allowed to stand on the premises until the first day of May next, the same hay not to be cut until paid for. January 4th, 1825." At the meeting at which the notes were signed, but after the signature thereof,

thereof, the defendant said to the plaintiff, " You will particularly oblige me by giving me a bill for the amount of the hay." The plaintiff rather objected. The defendant's brother, *S. Baxter*, on the 8th of the same month of *January*, took a bill of exchange for 145*l.* to the plaintiff, drawn upon him by the defendant, dated the 4th of *January* 1825, payable one month after date, which the plaintiff accepted. The defendant afterwards endorsed it to *George Baxter*, and the plaintiff paid it to *one Taylor*, the holder, when it became due. The stack of hay remained on the same field entire until the 20th of *January* 1825, when it was accidentally wholly consumed by fire, without any fault or neglect of either party.

A few days after the fire, the plaintiff applied to the defendant to know what he meant to do when the bill became due; the defendant said, " I have paid it away, and you must take it up to be sure: I have nothing to do with it; why did you not remove the hay?" The plaintiff said, " he could not, because there was a memorandum that it should not be removed until the bill was paid;" would you have suffered it to be removed?" and the defendant said, " certainly not." The defendant's set-off was for the price of the hay agreed to be " sold as aforesaid. The question for the opinion of the Court was, whether the plaintiff under the circumstances was entitled to recover the sum of 145*l.* or any part thereof.

Mr. Chitty for the plaintiff. The loss in this case must fall upon the defendant. There is a difference between the two contracts; the one contains a stipulation not in the other, that the hay was not to be cut until paid for. Now

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Now if that be a material part of the contract, then there was no one sufficient contract in writing to satisfy the statute of frauds, but assuming that there was a complete contract of sale without the stipulation, and that the plaintiff thereby consented to waive a right which he otherwise would have had, still the property in the hay had not passed to the vendee, because this was a sale upon credit, and the vendee was not entitled to have possession of the goods until the credit expired; and if so, the property did not vest in him until the credit expired. [*Holroyd J. In Comyn's Dig. tit. Agreement, (B 3)* it is laid down, "that if a sale be of goods for such a price, and a day of payment limited; the contract will be good, and the property altered by the sale, though the money be not paid;" and *R. 10. H. 7, 8 a. 14 H. 8. 20 a.* and *Dyer, 90 a.* are cited. And again, "If *A.* sell a horse to *B.* upon condition that he pay 20*l.* at *Christmas*, and afterwards sell it to *D.*, the sale to *D.* is void, though *B.* afterwards do not pay," and *Plowden's Com. 432 b.* is cited, and the reason there given is, that *A.* at the time of the second contract had no interest in, nor property, nor possession of the horse, nor any thing but a condition, and therefore the second contract was merely void.] It is true that in *Noy's Maxims*, p. 88. it is laid down, that "if I sell my horse for money I may keep him until I am paid, but I cannot have an action of debt until he be delivered, yet the property of the horse is by the bargain in the bargainee or buyer; but if he presently tender me my money and I refuse it, he may take the horse or have an action of 'detinue.'" But that relates clearly to the case of a ready money bargain. In *Goodall v. Skelton (a)*, *A.* agreed to sell

(a) 2 *H. Bl.* 516.

goods

goods to *B.*, who paid a certain sum as earnest; the goods were packed in cloth furnished by the buyer, and deposited in a building belonging to the seller until the buyer should send for them, but the seller declared at the same time that they should not be carried away till he was paid. It was held that the seller could not maintain an action for goods sold and delivered. In the present case the hay was to remain in possession of the seller, and not to be cut till paid for. This is distinguishable, therefore, from *Hinde v. Whitehouse* (*a*), where sugars in the king's warehouse were held to pass to the buyer by the contract of sale, although the duties were not paid. It is more like *Tempest v. Fitzgerald* (*b*), where the purchaser of a horse for ready money rode the horse, and requested that it might remain in *B.*'s possession for a further time, at the expiration of which he promised to fetch it away and pay the price. This was assented to by the seller, and it was held, that the seller could not recover on a count for horses bargained and sold, there having been no acceptance of the horse within the meaning of the statute of frauds.

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TAKING
against
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BAXTER J. It is quite clear that the loss must fall upon him in whom the property was vested at the time when it was destroyed by fire. And the question is, in whom the property in this hay was vested at that time? By the note of the contract delivered to the plaintiff, the defendant agreed to sell the plaintiff a stack of hay standing in *Canonbury Field* at the sum of 145*l.*, the same to be paid for on the 4th day of *February* next, and

(*a*) 7 *East*, 558.(*b*) 3 *B. & A.* 680.

JESSE. It is to be allowed to stand on the premises until the first day of May next. Now this was a ~~conditional~~ ^{immediate} sale, not a prospective sale. Then the question is,

BAXTER. In whom did the property vest by virtue of the contract? The right of property and the right of possession are distinct from each other; the right of possession may be in one person, the right of property in another. A vendor may have a qualified right to retain the goods unless payment is duly made; and yet the property in these goods may be in the vendee. The fact in this case, that the hay was not to be paid for until a future period, and that it was not to be due until it was paid for, makes no difference, provided it was the intention of the parties that the vendee should, by the contract, immediately acquire a right of property in the goods, and the vendor a right of property in the price.

The rule of law is, that where there is an immediate sale, and nothing remains to be done by the vendor as between him and the vendee, the property in the thing sold vests in the vendee, and then all the consequences resulting from the vesting of the property follow, one of which is, that if it be destroyed, the loss falls upon the vendee. The note of the buyer imports also an immediate, perfect, absolute agreement of sale. It seems to me that the true construction of the contract is, that the parties intended an immediate sale; and if that be so, the property vested in the vendee, and the loss must fall upon him. The rule for entering a nonsuit ~~must~~ therefore be made absolute.

HOLROYD J. I think that in this case there was an immediate sale of the hay, accompanied with a stipulation on the part of the vendee, that he would not cut it till a given

given period. Now, in the case of a sale of goods, if nothing remains to be done on the part of the seller, as between him and the buyer, before the thing purchased is to be delivered, the property in the goods immediately passes to the buyer, and that in the price to the seller; but if any act remains to be done on the part of the seller, then the property does not pass until that act has been done. I am of opinion, therefore, in this case, not only that the property immediately passed to the buyer by the contract, but that the seller thereby not immediately acquired a right in the price stipulated to be unpaid for the goods, although that was not to be paid until a future day. The property having passed to the vendor, and having been accidentally destroyed before the day of payment, the loss must fall upon him.

Case of HUNTER v. DAWLISH.—The parties on the 4th of January agreed for the sale and purchase of a stack of hay, to be paid for in a month. Thus the case would have occurred, but for the note of the contract delivered to the buyer, and in that there was a stipulation, that the purchaser should not cut until the money was paid, but the property in the hay had already passed by the contract of sale to the purchaser, and the latter afterwards merely retained his right to the immediate possession. Then the property having passed to the buyer, the loss must fall upon him, and, consequently, this rule for entering ~~an account~~ must be made absolute.

Rule absolute.

THE LAW OF CONTRACTS.—
HOMELANDS.—
It is to be observed, that the property in a thing
is not to be considered as belonging to the owner, unless
it is in his power to dispose of it, and to give it away.

CASES IN HILARY TERM

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CROWTHER against WENTWORTH.

There an annuity was granted by an indenture, which also contained a release of a former annuity: Held, that it was sufficient to describe the annuity-deed in the memorial as a grant of an annuity.

COVENANT upon an annuity-deed. Breach, non-payment of the annuity. The plea craved over of the deed, which appeared to be an indenture made the 14th December 1822, between H. Wentworth of the first part, A. Payne of the second part, J. Wentworth of the third part, W. Harris of the fourth part, and W. Crowther of the fifth part. It recited that Payne, on the 6th of March 1822, had contracted and agreed with Crowther for the sale to him, Crowther, of an annuity of 60l. during the life of him, Payne, in consideration of 495l. then paid by Crowther, and for securing the payment of the annuity, Payne executed a warrant of attorney, on which judgment had been entered up; and it was further agreed, that the premises comprised in the thereafter recited indenture of lease should be a security for the payment of the annuity. It further recited that Payne and Wentworth had been in partnership as millers, and on the 25th November then last had agreed to dissolve the partnership, on condition that Wentworth should advance to Payne 500l. and pay all partnership debts, in consideration whereof Payne was to assign the leasehold premises to Wentworth, subject to the payment of the annuity of 60l. to Crowther, and one other annuity of 41l. to Harris; that Payne did assign to Wentworth the premises comprised in the lease, subject to the payment of those two annuities; and that, in consideration of a release made by Harris to Payne of the annuity of 41l., and for other considerations, Wentworth grants

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Harris during the life of *Wentworth* an annuity of 100*l.*, to be issuing out of the leasehold premises, and for that purpose assigned the same to *Harris*, charged with the payment of that annuity. It then recited that all arrears of the annuity of 60*l.* had been duly paid to *Crowther*; and that, in further pursuance of the agreement of the 28th November, *Crowther* had, at the request of *Wentworth*, consented to release *Payne* from the annuity of 60*l.*, upon *Wentworth*'s granting to *Crowther* an annuity of equal value in lieu thereof; and that *Wentworth* having contracted with *Crowther* to grant a further annuity of 195*l.*, in consideration of 1000*l.*, then agreed to be advanced and paid by *Crowther* to *Wentworth*, it was agreed between *Crowther* and *Wentworth* that the two several annuities should be consolidated into one annuity of 195*l.*, to be granted by *Wentworth* to *Crowther* for the life of the former. It then recited that *James Wentworth* had agreed to join with his brother *H. Wentworth*, as his surety for securing the payment of the annuity of 195*l.*; and that, thereupon, *James Wentworth* and *H. Wentworth* had executed a warrant of attorney to confess judgment against them, and each of them, for the sum of 3000*l.* with a defeasance; and that it had been also agreed between the parties, that the annuity of 195*l.* should be further secured by such covenants as were thereafter contained. The indenture then stated, that in pursuance, and in part performance of the agreement on the part of *Crowther*, and in consideration of the premises, and particularly of the annuity of 195*l.* during the life of *H. Wentworth*, to be granted and secured in the manner thereinbefore expressed, and in lieu of the annuity of 60*l.* granted to him, *Crowther*, and intended to be thereby released; and in consideration of the

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the sum of 10s. to *Crowther* paid by *Payne* before the sealing and delivery of that indenture, &c., *Crowther* released, and for ever quitted claim unto *Payne* of all that annuity of 60*l.*, so granted by *Crowther* to *Payne*, and all arrears and future payments thereon. And in further performance of the aforesaid agreement, and in consideration of the release thereinbefore made by *Crowther* to *Payne* of the annuity of 60*l.*, and also in consideration of 1000*l.* paid by *Crowther* to *Wentworth*, he, *Wentworth*, gave, granted, and conditioned unto *Crowther* one annuity of 19*£*4*s.* for the life of him, *Wentworth*, to be paid by equal quarterly payments thereto mentioned. There was a covenant by *Wentworth* to pay the annuity on the days thereinafter mentioned. Plea, first, that no memorial of the indenture containing a description of the nature of the instrument by which the annuity was granted, was enrolled in the High Court of Chancery, according to the directions of a certain act of parliament made and passed in the 53 G. 3., whereby the said indenture was null and void, and this, &c., wherefore, &c. Plea, second, that no memorial of the indenture containing the true pecuniary considerations for granting the said annuity was enrolled in the High Court of Chancery, according to the directions of the said last mentioned act of parliament, whereby the indenture was null and void, and this, &c., wherefore, &c. Replication to the first plea, that a memorial of the indenture was, within thirty days after the execution thereof, duly enrolled in the High Court of Chancery in pursuance of the statute in that case made and provided. The replication then set out the memorial, and in the column headed "nature of the instrument," there were the words "grants of annuities and the like," and in the column headed "annuity,"

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It is to be observed, that the memorial contained the word "warrant of attorney to confess judgment," which was then deemed that the memorial contained the date of the indenture, the names of all the parties and of all the witnesses thereto, and of the person and persons for whose life and lives the annuity or rent charge was granted, and of the person and persons by whom the same was to be beneficially received, the pecuniary considerations and considerations for granting the same, and the annual sum and sum to be paid in manner and form as in aid by the statute in that case made and provided is required, as by the said enrolment remaining of record in the High Court of Chancery, more fully appears. There was a similar replication to the second pleader Dethurh and joinder.

It is difficult to ascertain what is the benefit memorandum set to stand out from the original instrument in support of the demurrer. The nature of the instrument by which the annuity was granted is not distinctly stated in the memorial. It is not described as being an indenture, but only as the grant of an annuity; but it contained also the release of a former annuity. It is not, therefore, a correct description of the deed to state merely that it was the grant of an annuity. Besides, the grant of an annuity may be by several instruments. The statute, 53 G. 3, c. 14, s. 2, requires a memorial to be enrolled in the High Court of Chancery "in the form or to the effect following." There is then follows a schedule containing several columns, one of which is headed "nature of the instrument"; and in that column, two species of deeds by which annuities may be granted are specified, viz. leases and releases, and bond in penalty. It is clear, therefore, that the legislature intended the party to describe the nature of the deed by which the annuity was granted;

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granted; and as the grant of an annuity may be by either of the instruments mentioned in the column, it follows that the word *grant* is no description of the nature of the instrument by which the annuity was granted within the meaning of the act of parliament. [*Littledale* J. An annuity is a thing lying in grant, and the word *grant* is a technical description of that species of instrument by which an incorporeal hereditament is conveyed.] In *Ex parte Mackrath* (a) the memorial of an annuity registered under the 17 G. 3. c. 26, stated that the bond, warrant of attorney, indenture, and deed poll given to secure the annuity were witnessed by four persons. It appeared that three of the instruments were attested by two persons only, and the Court held the act of parliament to be imperative, and set aside the annuity. In *Davison v. Gill* (b) it was held that an order made for stopping up an old footway and setting out a new one, must follow the form prescribed in the schedule annexed to the act, and set forth the length and breadth of the new footway; and in *Wiley v. Castthorne* (c) a memorial, under the annuity act, of a bond stating that *A.* and *B.* severally became bound, was held not to be sufficient in law, if the bond were joint as well as several.

F. Pollock contra. In *Butler v. Capel* (d) the memorial of an annuity under the 53 G. 3. c. 14, described an instrument as an assignment of certain leasehold premises, when in fact it was an underlease, and that was held to be a sufficient compliance with the statute.

(a) 2 East, 568.

(b) 1 East, 64.

(c) 1 East, 398.

(d) 2 D. & C. 221.

nd Lord Ellenborough there said that the statute was satisfied by a description of the instrument in popular language, although that were not according to its strictly legal effect.

He was then stopped by the Court.

BAYLEY J. I am of opinion that the memorial in his case is sufficient. The question turns upon the 53 G. 3. c. 141. That statute was passed to remedy the inconveniences resulting from several decisions which had taken place on the construction of the former annuity act. By the fifth section of the 53 G. 3. the grantor of an annuity may obtain a copy of the deed of grant, and he may thereby be furnished with a full description of it, provided he be enabled by the information required by the second section to obtain that copy at the public office. The question to be considered in this case is, what is required by the second section. That enacts, "that a memorial of every deed, of the names of the parties, of the witnesses, of the persons for whose lives the annuity is granted, and of the persons by whom the same is to be beneficially received, shall be enrolled in the High Court of Chancery, in the form and to the effect following, with such alterations therein as the circumstances or nature of any particular case may require." There then follows a schedule or form containing eight columns, under the first column is to be described the date of the instrument, and under the second the nature of the instrument, and in that column under the words *nature of the instrument*, three instances are given, viz. lease and release, bond in penalty, and warrant of attorney to confess judgment. Now those words convey no information to the person who reads the

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the memorial, as to the nature of the instrument. If the memorial specified a lease and release as the instruments by which the annuity was granted, it would convey no information to any person of the technical nature of the instrument. Here there is nothing but the word *grant* in the memorial; but I think the deed set out on oyer operates as a grant of an annuity, and that the word *grant* is a proper description of the nature of the instrument, within the meaning of the act of parliament. The other columns will supply the names of the parties, the names of the witnesses, and the persons for whose lives the annuity is granted; and when that information is supplied, the grantor may claim his copy under the fifth section. He will then see whether he has a copy of the instrument described in the memorial, whether it is attested by the same witnesses, and whether it is granted for the life of the person there described. It appears to me that the party has properly described the nature of the instrument, and that he has done every thing required by the act of parliament. The judgment of the Court must, therefore, be for the plaintiff.

HOLROYD J. I think that it is not necessary to state the nature of the instrument, except by reference to the other columns. It is said that the deed in question contained the release of another annuity, and that this circumstance ought to have been stated in the memorial; but it seems to me that the only reason for requiring the nature of the deed to be set out in the memorial is, that the party granting the annuity may know what to inquire for at the place of registering. The act of parliament is in some measure penal, for it avoids the security, and, therefore,

fore, it ought not to be construed too largely. It is not necessary to describe the deed as an *indenture*. It would make no difference if it were so described. If the word *indenture* were a material part of the description, the effect would be to prevent a party having recourse to any other instrument. I am of opinion that the nature of the instrument has been fully stated in the memorial, and that the act of indenture has been dispensed with. *A memorandum of a sum of money left in trust for the payment of a sum of money to a person left to be paid by the said person to another who concurred in the making and leaving of the same has been obtained by Judgment for the plaintiff. The goods and masts quantum et ad aliam qualiter ad voluntatem suam testatoris esse sunt; the action is for the sum of £100, which sum he left in trust to be paid to the plaintiff and to be paid by CAMBRIDGE against ALLENBY.*

The trial was adjourned to the next day, and the court adjourned to the 19th of December.

STAMPSTOCK. The declaration contained contents. It is an action for the price of goods sold and delivered, and the common goods, it appeared that the same were sold at York on Saturday the 19th of December 1825, and on the same day, at three o'clock in the afternoon, the vendor delivered to the vendee a payment of £100, as and for the price, certificated day of December 1825. On the same day, at the bank of D. and Co., Huddersfield, payable on demand to bearer. D. and Co. stopped payment on the 17th of December, at noon, and never afterwards assumed their payments; neither of the parties knew of the stoppage, or of the insolvency of D. and Co. The plaintiff cashed the notes, or presented them to the bankers for payment; but on the 17th, he required the vendee to take back the notes, and to pay him the sum of £100, the latter refused. Held, under these circumstances, that the vendor of the sum guilty of laches, and had thereby made the notes his own, and consequently, may operate as a satisfaction of the debt.

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three o'clock in the afternoon, the defendant delivered to the plaintiff at *York*, and the latter then and there received as and for a payment of the price of the corn, four promissory notes for *5l.* each, and four such notes for *1l.* each, of the bank of Messrs. *Dobson* and Sons, bankers at *Huddersfield*, in the county of *York*. The notes were in the following form, and the defendant's name was not written upon them:—

“ No. *Huddersfield Old Bank £5.*

“ I promise to pay the bearer on demand *5l.*
 value received, 1st day of *July* 1823.

“ Entered, &c. “ For *John Dobson* and Sons.
 “ *£5.* “ *W. Dobson.*”

At eleven o'clock in the forenoon of the same 10th of December, *Dobson* and Sons stopped payment, having on the same morning and up to that hour paid all demands made upon them. They never afterwards resumed their payments, and shortly afterwards became bankrupt, and the plaintiff never received any part of the amount due on the notes. *Huddersfield* is distant from *York* about forty miles, and from *Laythorn*, the plaintiff's residence, fifty-two miles. At the time when the above notes were paid by the defendant to the plaintiff, neither of them knew that *Dobson* and Sons had stopped payment or were insolvent. The plaintiff never circulated the notes, nor did he ever present them to *Dobson* and Sons, the makers, for payment; but on Saturday the 17th of the same month of December, the plaintiff required the defendant to receive back the notes, and to pay him the amount of them, which the defendant then and ever since has refused to do.

Dodd

Dodd for the plaintiff. The plaintiff is entitled to recover the price of his corn, unless he has by laches made the notes his own. It will be contended that he has done so, first, by not having presented the notes for payment, secondly, by not having offered to return them to the defendant earlier than he did. But presentment for payment was not necessary in this case, because the defendant was not a party to the notes, and cannot, under the circumstances, be damaged by the neglect to present them. This case differs from the several cases where bankers' notes having been taken before the bankers had stopped, presentment has been held to be necessary within a reasonable time after taking them. Here the notes were taken *after* the bankers had stopped, and they never resumed their payments. The defendant, therefore, cannot have been prejudiced by reason of the notes not having been presented for payment. If an action upon the notes had been brought against the bankers, or if the defendant had been an indorser, in either case it would have been necessary to aver and prove presentment for payment. But here the action is not brought upon the notes, nor is the defendant a party to them, and therefore he cannot insist on the want of presentment as a defence to this action. The distinction seems to be between persons merely passing bills or notes without being parties to them, and drawers and indorsers who are parties to them. In *Warrington v. Furber* (a), the vendee of goods having accepted a bill of exchange for the price, and becoming bankrupt before the bill was due, it was held that a guarantee of the acceptance who paid the

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(a) 8 East, 242.

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vendor the amount of the bill after the bankruptcy of the vendee, might recover the money from the latter without proving that any presentment was made to the acceptor before such payment by the guarantee, and that upon the ground that the liability not being upon the bill itself, but upon the guaranty, a presentment to the bankrupt acceptor was unnecessary. That case is *v. Boxes* (a) also shews that a person who is not a party to a bill cannot complain of laches or want of notice unless it has done him an actual prejudice; and *Swinyard v. Holbrow* (b) also shews that a person who is not a party to a bill cannot complain of laches in not giving him notice of dishonour by the acceptor, as he might do if he were a drawer or indorser; and *Murray v. King* (c) is to the same effect. In *Phillips v. Astling* (d), the want of presentment was held to be a good defence to an action brought upon a guaranty given for the price of goods to be paid for by a bill; but this was on the ground that the acceptor at the time when the bill became due was solvent. In *Holbrow v. Wilkins* (d), the plaintiff sold goods for the price of which the vendees accepted a bill, and the defendant guaranteed half the amount; but before the bill due the vendees became insolvent, and also that the plaintiff was then informed, and also that he had guaranteed to him for the sum which he had given, the bill was not presented for payment, and action brought against the defendant as guarantor was held that the want of presentment was not relevant to the action. That is an authority to shew that an action against a guarantee not party to a presentment for payment is unnecessary.

(a) 5 M. & S. 62.
(c) 2 Taunt. 206.

(b) 5 R. 4.
(d) 1 B.

sptor or maker is insolvent at the time the bill becomes
ue. These several authorities establish that the want
f presentment is no defence in this action, the defendant
nt not being a party to the bill, and not being actually
nnified by the neglect to present. The defendant
e merely passed the notes to the plaintiff in payment
f a debt; he did not transfer them to the plaintiff as
ndorsee: he may be considered, therefore, in the light
f a mere guarantee of the debt. As indorser he would
ave been liable only according to the usage and custom
f merchants, and in that case a neglect to present
ould be a breach of the obligation imposed by the law
merchant on the party taking the bill, to do all that is
ecessary to obtain payment from the acceptor, and to
ive due notice to the drawer and indorsers. The statute
s. 3 & 4 Ann. c. 9. s. 7. does not assist the defendant,
ince its terms do not apply to notes payable to bearer,
ut to bills of exchange only. It may be conceded that
f the bankers had not stopped before the time when the
otes ought in due course to have been presented, the
holders would have been guilty of laches by not having
presented them; but here the bankers had stopped even
t the very time when the notes were paid to the plain-
iff. Such notes pass from hand to hand like cash, and
t would be highly inconvenient to require every person
aking them after the stoppage of a bank to send them
rom any distance for presentment, when such present-
ment has become by the stoppage useless and nugatory.
Then as to the second point, there could be no legal
obligation on the plaintiff to return the notes to the
defendant any further than as the returning of them
ight operate as notice to the defendant that the makers
ad refused payment. It was the bounden duty of the

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defendant to take notice that the bankers had stopped payment; for a person who passes bankers' notes to another must be considered impliedly to undertake at the time when he passes them, that the makers of the notes are then solvent and in condition to pay them; and if they are not, there is a breach of this implied guaranty. The fact of their insolvency must be taken to be a matter rather within the knowledge of the party passing the notes than of the person receiving them. Notice of non-payment to the drawer of a bill is required on the presumption that he has funds in the hands of the acceptor; and notice to the indorser is required in order to enable him to take his remedy over against the drawer; but here the defendant was neither drawer nor indorser of the notes. There is no ground for presuming, that a mere passer of bankers notes has any funds in the hands of the bankers; nor has he, like the indorser of a bill or note, any remedy over against a third party on the instrument. It cannot reasonably be presumed, therefore, that the defendant could have derived benefit from having earlier notice of the dishonour of the notes. If he had *in fact* sustained any damage by reason of the want of notice, that fact should have been proved, as, for instance, if he had paid any money to the bankers after the stoppage, without setting off the sum due on the notes, and to that extent he would be entitled to be indemnified; but here he has sustained no such damage.

Cresswell contrà. By the statute 3 & 4 Anne, c. 9. s. 7., it is enacted, "that if any person doth accept any bill of exchange, for and in satisfaction of any former debt, the same shall be accounted a full and complete pay-

ment of such debt, if such person accepting any such bill for his debt doth not take his due course to obtain payment thereof by endeavouring to get the same accepted and paid." Here there was a former debt, the notes were taken for that debt, and the plaintiff did not take his due course to obtain payment thereof. It is clear, therefore, that unless bills of exchange stand upon a different footing from promissory notes, the debt for which the notes in question were given has been satisfied. But since the stat. 3 & 4 Ann. c. 9., there is no distinction in this respect between a promissory note and a bill of exchange. In *Bayley on Bills*, p. 171., it is laid down, that the receipt of a bill or note implies an undertaking from the receiver to every party to the bill or note, who would be entitled to bring an action on paying it, to present in proper time the one, where necessary, for acceptance, and each for payment; to allow extra time for payment, and to give notice without delay to such person of a failure in the attempt to procure a proper acceptance or payment. This is the general rule, and there are many cases where it has been held that the insolvency of the drawer and acceptor of a bill of exchange does not dispense with the necessity of notice; *Russell v. Langstaffe* (a), *Howe v. Bowes* (b), *Bolde v. Proctor* (c). In *Esdaile v. Sowerby* (d), the insolvency of the drawer and acceptor, and the knowledge of that insolvency by the defendant, was held not to dispense with the necessity of a demand of payment, and notice to the defendant of the dishonour of the bill; and it was there said, that notice means something more than knowledge, because it was competent to the

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against
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(a) Doug. 514.
(c) 4 B. & C. 517.

(b) 16 East, 112. 5 Taunt. 30.
(d) 11 East, 114.

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holder to give credit to the maker. From this it would seem that the holder of a bill, or promissory note, by neglecting to present them, is considered as giving a new credit to the acceptor or maker; and this view of the subject is taken by *Pratt* C. J., in the case of *Moor v. Warren* (a). There the defendant, at two o'clock in the afternoon, gave the plaintiff a banker's note, and he tendered it in payment the next morning at nine; the banker stopped a quarter of an hour before. In that case *Pratt* C. J. told the jury that the loss should fall on the defendant there being no laches in the plaintiff, who had demanded the money as soon as was usual in the course of dealing, and that keeping the note till next morning could not be construed giving a new credit to the banker; and the jury found for the plaintiff; and in *Holme v. Barry* (b) the circumstances were the same; and *King* C. J. of the Common Pleas gave a similar direction, and the jury found accordingly. But it follows from these cases, that if a new credit had been given, the loss would have fallen upon the holder of the instrument. In *Cory v. Scott* (c), the rule is well laid down, that notice of dishonour must be given to all parties, who, upon paying the bill or note, would be entitled to a remedy over against some prior party; and in *Dennis v. Morrice* (d), Lord Kenyon refused to receive evidence that no actual damage had been sustained from the neglect to give notice. Here the defendant, upon taking up the notes in question, would clearly have had a remedy over by action against *Dobson* and Co. If then the insolvency of the maker does not render notice of the dishonour unnecessary, and the defendant, according to the general

(a) *Str.* 415.(c) *3 B. & A.* 619.(b) *Str.* 415.(d) *3 Esp.* 1st.

rule

rule, was entitled to notice, the only remaining question is, whether it makes any difference that the notes were paid away by him after *Dobson* and Co. had stopped payment. There is no case precisely in point; but in principle there is no difference between this case and *Beaching v. ——* (a), where it appeared that a note of a country bank was given in payment while the bank continued open, but before the time allowed by the law merchant for presentment had expired, the bank failed; yet it was held that the holder was bound to present the note for payment in due time, and by neglecting to do so, made it his own. The cases of *Warrington v. Furbor*, and *Swinyard v. Bowes*, are wholly inapplicable: there the party, relying upon the want of notice, was unconnected with the instrument, and would not by paying it have acquired any remedy over against prior parties.

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BAYLEY J. I think that the defendant in this case is entitled to the judgment of the Court. One short observation disposes of *Warrington v. Furbor*, and *Swinyard v. Bowes*, the authorities cited to shew that it was not necessary in this case to prove presentment for payment. In those cases, the person insisting on the want of presentment was not a party to the bill; but here the defendant was a party to the notes, for they were payable to the bearer on demand, and he was the holder of them, and when such notes are passed from hand to hand, the person taking them must trace his right through the former holder. If the notes had been given to the plaintiff at the time when the corn was sold, he could have had no remedy upon them against

(a) *Holt, N. P. C. 515.*

the

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the defendant. The plaintiff might have insisted upon payment in money. But if he consented to receive the notes as money, they would have been taken by him at his peril. If indeed he could shew fraud or knowledge of the maker's insolvency in the payer, then it would be wholly immaterial whether they were taken at the time of sale or afterwards. Here the notes were given to him in payment subsequently, and the question is, whether they operate as a discharge of the debt due to the plaintiff in respect of the corn. The rule as to all negotiable instruments is, that if they are taken in payment of a pre-existing debt, they operate as a discharge of that debt, unless the party who holds the instrument does all that the law requires to be done, in order to obtain payment of them. Then the question is, what it was the duty of the plaintiff to do in order to obtain payment of these notes. They were intended for circulation. But I think that he was not bound *immediately* to circulate them, or to send them into the bank for payment; but he was bound, within a reasonable time after he had received them, either to circulate them or to present them for payment. Now here it is conceded, that if there had not been any insolvency of the bankers, the notes should have been circulated or presented for payment on the *Monday*. It is clear that the plaintiff on that day might have had knowledge that the bankers had stopped payment, and having that knowledge, if presentation was unnecessary, he had then another duty to perform.. In consequence of the negotiable nature of the instruments, it became his duty to give notice to the party who paid him the notes, that the bankers had become insolvent, and that he the plaintiff would resort to the defendant for payment of the notes; and it would then

then have been for the defendant to consider whether he could transfer the loss to any other person, for unless he had been guilty of negligence, he might perhaps have resorted to the person who paid him the notes. That party would, however, be discharged if he received no notice of non-payment, or of the insolvency of the bankers till a week after he had paid them to the defendant. The neglect, therefore, on the part of the plaintiff to give to the defendant notice of the insolvency of the bankers, may have been prejudicial to the defendant. The law requires that the party on whom the loss is to be thrown, should have notice of non-payment, in order to enable him to exercise his judgment whether he will take legal measures against other parties to the bill or note. Now here, if the notes had been returned on the *Tuesday* to the defendant, he might have taken steps against the bankers, and he had a right to exercise his judgment whether he would do so or not, although they had stopped; or he might have had a remedy against the person who had paid him the notes. It may be hard in some cases that the entire loss should fall upon any one individual, but it is a general rule applicable to negotiable instruments, and not to be relaxed in particular instances, that the holder of such an instrument is to present promptly, or to communicate without delay notice of non-payment, or of the insolvency of the acceptor of a bill or the maker of a note, for a party is not only entitled to knowledge of insolvency, but to notice that in consequence of such insolvency he will be called upon to pay the amount of the bill or note. The case of *Beeching v. -----* is an answer to the whole of the argument for the plaintiff, founded upon the fact, that the notes were paid away *after* the bank had stopped. For these reasons I am of opinion that the plaintiff is

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not entitled to recover, and that a judgment of nonsuit ought to be entered.

HOLROYD J. I think that, under the circumstances of this case, the plaintiff is not entitled to recover. The notes were paid by the defendant and received by the plaintiff as money, and having been paid and received as money, and both parties being innocent, and the notes being what they imported to be, it seems to me that they must, according to the case of *Miller v. Race* (a), operate as payment. But without deciding that the plaintiff was debarred in the first instance from electing to consider them either as negotiable instruments, or as money, I think they operated as payment, and that the plaintiff, by not taking due steps to obtain payment, lost his right to return them to the party from whom he received them; for although bills and notes, delivered as satisfaction of a debt, do not in general operate as a satisfaction, unless they turn out to be valuable, yet the case is otherwise if due steps are not taken to obtain payment from the party who is in the first instance bound to pay them. The instruments in question are, in point of law, promissory notes, and therefore due diligence ought to have been used to obtain payment, and if payment had been refused, notice ought to have been given of that refusal. Now, here the notes were not presented for payment. It is true, that at the time when the plaintiff ought to have presented them for payment, the bankers had become insolvent; but that being so, the plaintiff ought then, at all events, to have given notice to the defendant that the bankers had become insolvent; and that he, the plain-

(a) 1 *Burr.* 452.

tiff,

iff, therefore required him, the defendant, to pay them. Not having done so, I think the plaintiff is not entitled to recover.

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LITTLEDALE J. I think the plaintiff is not entitled to recover. If the notes were taken as negotiable instruments, then they were taken subject to a condition, that the holder would do all that was required to obtain payment in that case; and they ought to have been presented for payment within a reasonable time, or at least notice of the insolvency of the bankers ought to have been given to the defendant. If they were taken as money, absolutely and without any condition, then the plaintiff took them for whatever they might be worth. It would be otherwise if they were forged, for then they would not be what they purported to be. But here, they were what they purported to be. I think that there is no guarantee implied by law in the party passing a note payable on demand to bearer, that the maker of the note is solvent at the time when it is so passed.

Judgment of nonsuit.

The Earl of FALMOUTH against PENROSE.

THIS was an action of assumpsit brought by the plaintiff, to try his right to have the second best fish out of the cargoes of all fishing boats landing in a certain cove, called *Senn Cove*, in the county of *Cornwall*, in respect of his liability to keep up a capstan and rope there for the purpose of hauling the boats out of the sea. The declaration contained several special counts,

Indebitus
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in which it was alleged that the plaintiff was entitled to the second best fish of all sorts of fish. There were also several indebitatus counts, in which it was stated that the defendants were indebted to the plaintiff in divers, to wit, 100 fish of the value of 10*l.*, for divers tolls or dues, due and of right payable from the defendants to the plaintiff, on and in respect of the defendants; having before then used and enjoyed, and having had the liberty and privilege of using and enjoying divers capstans, machines, windlasses, and ropes of the plaintiff, to haul and assist in the hauling of divers boats of the defendants, and of divers other boats which the defendants had used on to the beach, to wit, at, &c. in the county aforesaid; and being so indebted, &c. Plea, general issue. At the trial before *Gassée J.*, at the Summer assizes for the county of Cornwall 1826, it appeared that the practice had been for the owner of every fishing boat landing its cargo in *Senn Cove*, to select a fish for himself, and for the plaintiff's agent then to select another, which fish so selected was rendered to the plaintiff. But it was doubtful on the evidence, whether the practice had been to render the second best fish of all sorts of fish, or only the second best fish of all sorts, pilchards excepted; and that question was finally submitted to the jury, who found the custom to have been to render the second best fish of all sorts of fish, pilchards excepted. A verdict was found for the plaintiff on the indebitatus counts, but leave was given to the defendants to move to enter a nonsuit, if the Court should be of opinion that those counts were not supported by the evidence. A rule nisi having been obtained for that purpose,

R. Bayley

R. Bayley and Carter now shewed cause. *Fitzherbert's Natura Brevia* 119 H. is an authority to shew that debt will lie for twenty quarters of wheat or for a horse, and the form of the writ in debt for money as well as for goods and chattels is there given. In the latter case the form is that the defendant render to *B.* a certain book, or a certain cup, or a certain horse, or two lambs of the price of, &c., which he unjustly detains from him. In *Comyn's Digest*, tit. *Debt*, (A.5) it is laid down that debt lies though the lease be rendering corn or other collateral thing. Now it is a general rule that indebitatus assumpsit will lie in respect of every parol contract for which debt lies, and in *The Mayor of Reading v. Clark* (a), the plaintiff declared in indebitatus assumpsit for 500 quarters of wheat for toll, and although the declaration was held bad upon special demurrer, for not stating the value of the corn, yet it seemed to be admitted that in other respects the declaration was properly framed in assumpsit. In this case if the value had been omitted the declaration would have been sufficient after verdict.

C. F. Williams and Halcomb contra. Assuming that indebitatus assumpsit is maintainable for fish, there was no evidence of a promise to pay fish generally, but merely to pay such fish as the plaintiff or his agent should select; the count is therefore not proved.

Cur. adv. null.

BAYLEY J. The only question is, whether the plaintiff can in this case recover upon a general indebitatus count. There are authorities to shew that debt will lie for

(a) 4 B. & A. 268.

a chattel.

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chattel. If so, we see no reason why assumpsit will not also lie, but then the promise as well as the consideration must be proved. Upon the evidence, it appears that it was the custom for the plaintiff or his agent to select his fish, and that that selection being made, the same was rendered to him. If, therefore, the defendant had refused to render the fish so selected, or had refused to let the plaintiff select one, he might have maintained a special action on the case for damages; but there was no legal liability on the part of the defendant to pay any given fish to the plaintiff before selection, and, consequently, no promise is implied by law on his part to do so. The plaintiff, therefore, has failed to prove any assumpsit or promise on the part of the defendant to render fish. The rule for a nonsuit must therefore be made absolute.

HOLROYD and LITTLEDALE Js. concurred.
Rule absolute.

ROHDE and Others against THWAITES.

A. having in his warehouse a quantity of sugar, in bulk, more than sufficient to fill twenty hogsheads, agreed to sell twenty hogsheads to B., but there was no note in writing of the contract sufficient to satisfy the statute of frauds. Four hogsheads were delivered to and accepted by B. A. filled up and appropriated to B. sixteen other hogsheads, and informed him that they were ready, and desired him to take them away. B. said he would take them as soon as he could: Held, that the appropriation having been made by A., and assented to by B., the property in the sixteen hogsheads thereby passed to the latter, and that their value might be recovered by A. under a cause for goods bargained and sold.

the plaintiffs to the defendant upon request, and to
paid for at the expiration of two months then follow-
; ; and in consideration thereof, and that the plaintiffs,
the like request of the defendant, had undertaken and
thfully promised the defendant to deliver the goods to
n, he, the defendant, undertook and faithfully pro-
sed the plaintiffs to accept the goods when he should
requested, and to pay them, the plaintiffs, for the
re, at the expiration of the said credit. Averment,
t the price of the goods amounted to a certain sum,
wit, &c., and that although the plaintiffs had always
m ready and willing to deliver the goods to the de-
dant, and requested him to accept the same, and
hough the credit had expired, yet the defendant did
, nor would, at the time when he was so requested,
any time before or afterwards, accept the goods or
y the plaintiffs, or either of them, for the same, but
used so to do. There was then an indebitatus count
goods bargained and sold. The defendant suffered
lgment to go by default. Upon the execution of the
it of inquiry the plaintiffs proved that a contract for
sale of twenty hogsheads of sugar was made on
3d of December 1825, at 56s. 6d. per cwt., but
re was no sufficient note in writing to satisfy the
ate of frauds. On that day the plaintiff had in his
rehouse on the floor, in bulk, a much larger quantity
sugar than would be required to fill up twenty hogs-
uds, but no part of it was in hogsheads. The de-
dant saw the sugar in this state in the plaintiffs'
rehouse, and then made the contract in question.
ur hogsheads were filled up and delivered to the
endant on the 10th of December, and a few days
rwards the plaintiffs filled up the remaining sixteen

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hogsheads, and gave notice to the defendant that they were ready, and required him to take them away; he said he would take them as soon as he could. They were not weighed till *February 1826*, when the plaintiff delivered a bill of parcels to the defendant. The plaintiffs added to the bulk, from time to time, as sales were made, and it did not very distinctly appear whether the sixteen hogsheads were filled wholly with the same sugar which was in the warehouse on the 3d of *December* when the contract was made. The four hogsheads which were first delivered were filled with that sugar. It was admitted that there was sufficient evidence of a sale of the four hogsheads, inasmuch as there was an acceptance of them by the defendant. No contract in writing sufficient to satisfy the statute of frauds having been proved, it was insisted that there was no evidence of any contract of sale of the sixteen hogsheads of sugar, and that the plaintiff could only recover for the four hogsheads which had been actually delivered; but the jury, under the direction of the under sheriff, found a verdict for the value of the twenty hogsheads. A rule nisi for setting aside the writ of inquiry having been obtained by *Hutchinson* in *Trinity term*,

F. Pollock now shewed cause. The defendant, by suffering judgment to go by default, has admitted the contract stated in the declaration, and the plaintiff, therefore, are entitled to recover any damages sustained by breach of that contract. Secondly, the defendant accepted four hogsheads of the sugar. This is a case, therefore, within the exception of the seventeenth section of the statute of frauds, for the buyer has accepted part of the goods sold, and actually received the same.

Thirdly,

Thirdly, there has been an acceptance of the whole: for after the sixteen hogsheads were separated from the bulk, the defendant being required to take them away, said he would as soon as he could. This is equivalent to an acceptance of the sixteen hogsheads.

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—
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T. WALTERS.

Hutchinson contra. By suffering judgment by default, the defendant admits generally the plaintiffs' right to recover on the contract stated in the declaration to a certain extent, and in this case he admits the right of the plaintiffs to recover the value of the four hogsheads which were actually delivered. Secondly, the seventeenth section of the 29 Car. 2. c. 9. enacts, "that no contract for the sale of any goods for the price of 10*l.* or upwards shall be allowed to be good except the buyer shall accept part of the goods *so sold*, and actually receive the same." Now, in this case, no specific twenty hogsheads of sugar were agreed to be sold, but the plaintiffs were to select from a large bulk in their warehouse, a sufficient quantity of sugar to fill twenty hogsheads. At the time when the four hogsheads were delivered to and accepted by the defendant, the quantity required to fill the other sixteen hogsheads had not been separated from the bulk. The four, therefore, did not constitute any part of the twenty, and consequently the acceptance of the four was not an acceptance of part of the goods sold; and if that be so, as there was no sufficient note in writing of a contract of sale, the property in the sixteen hogsheads did not pass to the defendant, and as the plaintiffs' claim is founded on a bargain *and sale*, they cannot upon this declaration recover more than the value of the four hogsheads which were sold to and accepted by the defendant.

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BAVLEY J. Where a man sells part of a large parcel of goods, and it is at his option to select part for the vendee, he cannot maintain any action for goods gained and sold, until he has made that selection; but as soon as he appropriates part for the benefit of the vendee, the property in the article sold passes to the vendee, although the vendor is not bound to part with the possession until he is paid the price. Here there was a bargain, by which the defendant undertook to take twenty hogsheads of sugar, to be prepared or filled up by the plaintiffs. Four were delivered; as to them there is no question, but as to the sixteen it is said, that as there was no note or memorandum of a contract in writing sufficient to satisfy the statute of frauds, there was no valid sale of them; and that the plaintiffs in their declaration having stated their claim to arise by virtue of a bargain and sale, cannot recover for more than the four hogsheads which were actually delivered to and accepted by the defendant; that in order to recover for the others they ought to have declared specially, that, in consideration that the plaintiffs would sell, the defendants promised to accept them. In answer to this, it is said, that there was an entire contract for twenty hogsheads, and that the defendant, by receiving four, had accepted part of the goods sold within the meaning of the seventeenth section of the statute of frauds. In fact, the plaintiffs did appropriate, for the benefit of the defendant, sixteen hogsheads of sugar, and they communicated to the defendant that they had so appropriated them, and desired him to take them away; and the latter adopted that act of the plaintiffs, and said he would send for them as soon as he could. I am of opinion, that by reason of that appropriation made by

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IN THE 7TH & 8TH YEARS OF GEORGE IV.
BETWEEN SIR JAMES THOMAS BROWN, Plaintiff,
the plaintiffs, and assented to by the defendant, the
property in the sixteen hogsheads of sugar, passed to the
vendee. That being so, the plaintiffs are entitled to re-
cover the full value of the twenty hogsheads of sugar,
under the count for goods bargained and sold. The
cause for setting aside this writ of inquiry must therefore
be discharged.

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THWATER.

At the time of the original sale, it was agreed to sell
between Mr. Holroyd, J. The sugars agreed to her sold, being
part of a larger parcel, the vendors were to select
twenty hogsheads for the vendee. That selection was
made by the plaintiffs, and they notified it to the de-
fendant, and the latter then promised to take them away.
That is equivalent to an actual acceptance of the sixteen
hogsheads by the defendant. That acceptance made, the
goods his own, subject to the vendor's lien, as to the
vendors. If the sugars had afterwards been destroyed by
fire, the loss must have fallen on the defendant. I am
of opinion that the selection of the sixteen hogsheads by
the plaintiffs, and the adoption of that act by the de-
fendant, converted that which before was a mere agree-
ment to sell into an actual sale, and that the property in
the sugars thereby passed to the defendant; and, con-
sequently, that he was entitled to recover to the value of
the whole under the count for goods bargained and
sold. *Rule discharged.*

Leylandale, J. concurred. Sir, on the facts of this case, I
have no objection to the defendant recovering the sum
of £1000, value of the goods sold, and the costs of the
action, notwithstanding the fact that the plaintiff has
not been negligent in failing to sue him for the same.

D d 3

1827.

COLLING, Gent., One, &c., against TREWEEK.

A copy of an attorney's bill, not signed by the attorney, the original of which, duly signed, has been delivered to the defendant, is admissible in evidence, without proof of notice to produce the original.

THIS was an action of assumpsit brought to recover the amount of an attorney's bill. The cause was undefended; and at the trial before *Littledale J.* at the Summer assizes for the county of *Devon*, 1826, it appeared that the plaintiff had not given the defendant notice to produce the bill delivered to him, but a witness proved that the bill so delivered was signed by the plaintiff; and then produced a paper, which he swore to be a copy of the bill delivered; and the plaintiff himself offered, at the trial, to sign the copy then produced. The paper, however, was not signed by the plaintiff himself, but there was a copy of the plaintiff's signature made by the witness. The evidence was rejected, on the ground that the copy was not admissible in evidence, notice not having been given to the defendant to produce the original; and that, at all events, it was no evidence of a bill signed by the plaintiff having been delivered. The plaintiff gave evidence, that the charges were reasonable, and that the business charged for had been done at the request and on account of the defendant. The learned judge nonsuited the plaintiff, but reserved liberty to the plaintiff to move to enter a verdict for the amount proved. A rule nisi having been obtained for that purpose on two grounds; first, that the bill delivered to the defendant was a notice to him of the amount of the plaintiff's demand, and of his intention to enforce payment by action, unless the defendant had

nd the bill taxed ; and, secondly, assuming it not to be notice, it was competent to the plaintiff at the trial to give the copy produced in evidence, and thereby to make a duplicate original,

1827.

Collins
against
Tawney.

Carter and *Tucker* now shewed cause. The cases establish that a duplicate original may be given in evidence without any notice to produce the counterpart. But the words *duplicate original* imply a contemporary writing. In *Philipson v. Chace* (a) Lord Ellenborough says, "If there be two contemporary writings the counterparts of each other, one of which is delivered to the opposite party, and the other preserved, as they may both be considered as originals, and they have equal claims to authenticity, the one which is preserved may be received in evidence without notice to produce the one which was delivered;" and he intimated that that must have been the ground on which *Anderson v. May* (b) was decided. In this case the paper produced was a copy made from the bill delivered to the defendant; it was not therefore a duplicate original. The term *original* imports an instrument of the same character. If both instruments were original, the delivery of either of them to the defendant would have been sufficient to entitle the plaintiff to maintain this action at the expiration of a month; but that which was not signed clearly would not have entitled the plaintiff to maintain the action, and consequently it cannot have been an original. The plaintiff could not at the trial by signing the copy make it evidence. He was bound to prove by legal evidence the delivery of a bill, signed by him, to the defendant,

(a) 2 Cambd. 110.

(b) 2 Bos. & Pul. 237.

1827.

Citing
Cases
Tribute

one month before action brought. That could only be done by the production of the bill so signed, or of a duplicate original signed one month before action brought, or by giving the defendant notice to produce the original, and on his failure so to do, by producing a copy.

Wright contra. *Philipson v. Chace* (*a*) is not in point, for there no copy of the bill was either proved to have been made or produced in evidence, but the proof attempted to be given of the delivery of the bill was by reading the items of charge from the plaintiff's books, from which the bill was stated to have been copied; but here a bill was made out and proved at the trial to have been signed by the plaintiff and delivered to the defendant, and a copy of that bill and of the plaintiff's signature to it, was produced in evidence. This bill, delivered under the 23d section of the act 2 G. 2. c. 23., may be considered a notice to the defendant of the amount of the plaintiff's demand; and then the copy produced was evidence, according to the doctrine laid down in the cases cited, and particularly in the case of *Kine v. Beaumont* (*b*). There two of the learned Judges are stated to have said that there was not any difference between a duplicate original, and a copy made at the time and authenticated on oath. *Anderson v. May* (*c*) is an authority expressly in point, that this evidence was sufficient without giving the defendant notice to produce the bill delivered to him; and it does not appear in that case, that the copy produced in evidence had the signature of the plaintiff; but assuming it to be necessary

(*a*) 1 Camp. 110.(*b*) 3 B. & B. 288.(*c*) 2 Bos. & Pul. 237.

that

that the bill produced in evidence, as well as that delivered to the defendant, should be signed by the plaintiff, in a case where notice has not been given to produce the original, the plaintiff is entitled to have this nonsuit set aside, and a verdict for the full amount of his bill entered against the defendant, because he offered at the trial to sign it, and to make it a duplicate of the bill delivered; and the witness on such signature being added, would have proved it to be a duplicate. By a general order of the Court of Chancery of the 12th August 1809, relating to bankrupt petitions, it is required that the signature of each person signing as a petitioner, shall be attested by the petitioner's attorney presenting the petition; and in *Ex parte Weston*, (a) it was held that a bankrupt petition signed by the agent of the attorney who presented the petition, was not a sufficient compliance with the order; but the attorney and petitioner being in Court when the objection was made, they were permitted to sign the petition, and the objection was then obviated. And this is not doing more in principle than is done by allowing instruments to be stamped after they have been executed by the parties, and when the proper stamps cannot be impressed upon them without payment of a penalty, or by allowing releases at trials of *Nisi Prius*, after a witness has been called and rejected on the ground of interest.

Cur. adv. null.
BAYLEY J. This was an action brought to recover the amount of an attorney's bill. There was a nonsuit on the ground that a copy of the bill could not be resolved in evidence because the plaintiff had not given

(a) 1 Mod. 75. 3d & 4th Ed. (1)

1887.

COLLING
against
TAWKE.

the defendant notice to produce the original bill delivered to him. A rule was obtained for entering a verdict for the plaintiff on two grounds, first, that it was not necessary to give any notice to produce the bill delivered to the plaintiff, because that bill itself was a notice, and that it was not necessary in any case to give notice to produce a notice. Secondly, that the witness who proved the delivery of the bill to the defendant, having proved also that he made this copy of the bill and of the plaintiff's signature to it, which copy, if it had been signed by the plaintiff, would have been a duplicate original, and the plaintiff at the trial having offered to sign the copy, it was insisted that he ought to have been permitted to do so, and that if he had it would then have been admissible evidence. Our opinion is not founded upon the latter ground, but we think that notice to produce the bill delivered to the defendant was not necessary in this case, because the bill delivered to him was in the nature of a notice. There are three descriptions of cases where notice to produce an instrument is unnecessary; first, where the instrument produced and that to be proved are duplicate originals; secondly, where the instrument to be proved is a notice; as a notice to quit, or a notice of the dishonour of a bill of exchange. In *Kine v. Beaumont* (a), the Court of Common Pleas, after consulting the Judges of the other courts, held that the copy of an original letter giving notice of the dishonour of a bill was admissible without notice to produce the original letter, and *Dallas C. J.* there said, that he could not see any great difference between a duplicate original and a copy made at the time. The third case is where, from the nature of the suit, the opposite party must

(a) 3 B. & B. 288.

know

know that he is charged with possession of the instrument. Thus, in an action of trover for a bond or note, parol evidence of the instrument may be given although no previous notice be proved. Our opinion in this case is founded upon this, that the bill delivered one month before action brought is substantially in the nature of a notice to the defendant of the amount of the plaintiff's demand, and that he will enforce that demand by action unless the defendant proceeds to tax his bill under the statute. The statute 2 G. 3 c. 23 says, that no attorney shall commence any action for the recovery of fees, &c. until the expiration of one month or more after such attorney shall have delivered to the parties, to be charged therewith, a bill of such fees, &c.; which bill shall be subscribed with the proper hand of such attorney; and it then enacts, "that the bill may be taxed upon application of the party chargeable by such bill, and upon his submission to pay the whole sum that upon taxation shall appear to be due." As no action, therefore, can be brought by an attorney to recover the amount of his bill until the expiration of one month after he shall have delivered to the party to be charged, a bill of his fees, &c.; the delivery of such a bill must, in effect, be a notice to the party sought to be charged, that unless he pays the amount or proceeds to tax the bill pursuant to the provisions of the statute, the attorney will bring an action to recover the amount, and when such a bill has been delivered and an action is afterwards brought by the attorney, it is brought in pursuance of the notice. Besides, this case may, perhaps, fairly be considered as falling within that class of cases where notice to produce has been held to be unnecessary, viz. on the ground, that from the nature of the suit the opposite party must know that he is charged with

1827.

COURT
of
Appeal
TAXATION

1827.

 Cottine
against
Tawwee.

with possession of the instrument. For here, from the very nature of the suit, the defendant must have known that the plaintiff sought to recover the amount of that bill which had been delivered to him, and which, in the ordinary course of things, must be in his possession. We do not proceed altogether without authority on this point. In *Anderson v. May* (*a*) a copy of an attorney's bill, the original of which had been delivered to the defendant, was held to be admissible in evidence without proof of notice to produce the original. From the report of that case in *3 Esp.*, it may be collected that the bill delivered was not made at the same time with the copy, for *Shepherd*, Serjt., states that the one produced was *not a copy* of the other, but a duplicate original, the two having been copied from the books of the plaintiff. In *Philipson v. Chace* (*b*) Lord *Ellenborough* seems to have thought that the decision in *Anderson v. May* proceeded on the ground that they were contemporary writings. But having ascertained, as we think, satisfactorily, that the instrument given in evidence in that case was not made contemporaneously with that which was delivered to the defendant, we think the decision in that case in point, and sustainable on the ground that the bill delivered was a notice. That being so, we are of opinion that the copy of the bill delivered was admissible in evidence, without giving any notice to produce the bill delivered, and consequently the rule for entering a verdict for the plaintiff must be made absolute.

Rule absolute.

(*a*) *2 Bos. & Pwl.* 237.

(*b*) *2 Campb.* 110.

END OF HILARY TERM.

C A S E S

ARGUED AND DETERMINED

1827.

IN THE

Court of KING's BENCH,

Easter Term,

In the Eighth Year of the Reign of GEORGE IV.

MEMORANDA.

IN the course of this vacation the Earl of *Eldon* resigned the Great Seal, and was succeeded in the office of Lord High Chancellor by Sir *John Singleton Copley*, knight, Master of the Rolls, who was created a peer of the United Kingdom of *Great Britain and Ireland*, by the name, style, and title of Baron *Lyndhurst* of *Lyndhurst*, in the county of *Southampton*. His Lordship took his seat on the bench of the Court of Chancery on the first day of this term.

Sir *Charles Abbott*, knight, Lord Chief Justice of this Court, was created a peer of the United Kingdom of

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E e

Great

1827. — *Great Britain and Ireland, by the title of Baron Tenterden of Hendon, in the county of Middlesex.*

Sir *Robert Graham*, knight, one of the Barons of his Majesty's Court of Exchequer, resigned his office, and was succeeded by *John Vaughan*, esquire, one of his Majesty's Serjeants, who was knighted.

Sir *C. Wetherell*, his Majesty's Attorney-General, resigned his office, and was succeeded by *James Scarlett*, esquire, one of his Majesty's Counsel, who was knighted.

1827.

LIZABETH HOUSTON and CHARLOTTE GRIFFITH
against HENRY ALRIGHT HUGHES, C. DOWDING,
 ELIZABETH CHARLOTTE STRONG, ELINOR
 BERESFORD STRONG, ANN STRONG, SUSANNAH
 STRONG, CHARLOTTE SARAH STRONG, NICHOL-
 SON PEYTON, ELIZA PEYTON, CHARLOTTE LEA
 PEYTON, REYNOLDS PEYTON, THOMAS GRI-
 FITH PEYTON, HENRY PEYTON, and FRANCIS
 PEYTON.

Same Plaintiffs *against* THOMAS LESINGHAM.

Same Plaintiffs *against* WILLIAM PEYTON and
 ELIZABETH PEYTON.

Same Plaintiffs *against* ANNA MARIA SMITH.

THE following case was sent by the Master of the
 Rolls for the opinion of this Court:—

Henry Lambert, late of the Bartons in the parish of
 Dell and county of Hereford, Esq., duly made and
 published his last will, bearing date the 26th of Septem-
 ber 1811, and executed and attested in the manner

Under a devise
 of freehold
 lands to trust-
 ees and their
 heirs, in trust
 for certain te-
 nants for life,
 and after their

use for other persons in remainder, the trustees take an estate in fee, unless a contrary
 intention is clearly manifested on the face of the will; and, therefore, where A., being seized in
 freehold and copyhold lands, and having also leaseholds for lives and for years, and
 personal property, devised and bequeathed to trustees, their heirs and assigns, all his
 lands, &c., freehold, copyhold, and leasehold, and all his personal estate in trust, to hold the
 freehold and copyhold, and all such other of his estates as were less than freehold, unto the
 trustees, their heirs, &c., for and during all his the testator's right, title, and estate therein
 in trust, first to pay debts and funeral expences, and then to apply the annual income to
 the use of his two nieces for their lives; and after their decease, there were devises to their
 children and grandchildren, male and female, in terms so ambiguous and contradictory as
 to make it doubtful what equitable interest the children or grandchildren took: it was
 agreed, that the trustees took an estate in fee in the freehold and copyhold lands, and an
 absolute interest in the leaseholds for life and years.
 Seemle, That in a case sent from the Court of Chancery, this Court will not give any
 opinion upon the construction of a devise of an equitable estate.

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Houston
against
Hughes.

required by law for devising freehold estates, in the words and figures following (that is to say); "First, will and direct that all my just debts, funeral and testamentary expences, be fully paid and satisfied. I give and devise, bequeath unto *Abraham Robarts* and unto *Hughes*, and unto *John Platt*, and to their heirs forever, all my messuages or tenements, farms, lands, hereditaments, estates, and premises whatsoever or wheresoever, freehold, copyhold, or leasehold (having surrendered my copyhold estate to the use of my said will), in possession, reversion, remainder, or expectancy, or whereof I have a disposing power, with their several and respective members, rights, and appurtenances, to have and to hold such of my said hereditaments and premises as are freehold, unto the said *A. Robarts*, *H. Hughes*, *J. Platt*, their heirs and assigns, and to have and to hold my copyhold, and all such other of my estates as are less than freehold, unto *A. R.*, *H. H.*, *J. P.*, for and during all my right, title, and estate-term therein or thereto respectively, according to the nature and quality of the said estate respectively. I likewise give and bequeath to *A. R.*, *H. H.*, and *J. P.* all my ready money, securities for money, household and other goods, plate, china, linen, cattle, chattels, and all other my personal estate of what nature or kind soever, as and for and to the end that my trustees alone may have full power, and clear and absolute authority to release, convey, assign, and assure all and every the estates and premises which, at the time of making and of executing this my will, and at my death, may be vested in me as mortgagee in fee, or as a trustee, without calling upon my heir at law to concur or join in any release or transfer of any such premises, or have any affirmation concerning what belongs

longs to my real or personal estate whatsoever; and I do give and devise all my estates, title, and interest in and to such premises as last mentioned, together with all benefit and advantages thereof, to *A. R., H. H., J. P.*, in trust and confidence that they shall hold all my lands, tenements, real and personal estates, for the uses hereinafter mentioned. I give *A. R., H. H., J. P.*, on condition that they undertake and execute the office of trustees, also the several trusts therein this my will contained, 200*l.* a piece to each, but only to such of them as shall prove my said will, and that all the charges and expences of my trustees herein mentioned in this trust shall be paid out of my personal estate; and that if any or either my trustees die, or refuse to act in the trust, that then my other trustee or my trustees shall have a power of choosing a trustee in the place of such trustee or trustees so dying or refusing to act, and so often as the same do happen, to the intent of keeping a sufficient number of acting trustees, and that the trust may not descend to the heirs of the survivors; and my will is, that the said trustee or trustees so chosen shall have the same power and estate as given to the trustees herein named. I give to my niece, Mrs. *S. Houghton*, formerly of *Grafton Street, Dublin*, and the eldest daughter of my sister, Mrs. *Ruth Leay*, 300*l.* a-piece each, upon their respective marriage of each of her grandchildren, with the consent of their mother, or when they attain the age of 21 years; and if any die, their share to be equally divided between her male and female sons and daughters. And I give to Miss *Eliza Griffith*, the daughter of Mrs. *Charlotte Griffith*, late of *Grafton Street*, in the city of *Dublin*, in the kingdom of *Ireland*, five hundred on her respective marriage, with her mother's consent, or when

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she attains the age of twenty-one years. And I give [redacted]
Miss *E. Kelly*, of the Custom House, five hundred pounds [redacted]
And I give to Miss *S. Kelly*, two hundred pounds. A [redacted]
I give to Mr. *Henry Hughes*, of Worcester, three hundred [redacted]
trustees shall hold all my lands, tenements, real and personal [redacted]
property of what kind or nature soever, and all my estates and interest in the same, to be held by [redacted]
my trustees in trust, and then apply the income and annual amount of such property to the use of my two [redacted]
nieces, *E. S. Houghton* and *C. Griffith*, for their lives and proper use and benefit, and after their decease [redacted]
such child, or if more than one to the use of such children, in manner following; to wit, if male issue [redacted] of my niece, Mrs. *S. Houghton*'s daughter, Mrs. Strong, then I give and devise to my trustees *A. R., H. H., J. P.*, that they shall hold all my lands in trust and confidence, that they shall hold my will in whatsoever [redacted] my real estate or personal estate and interest therein [redacted] come to my two nieces by virtue of this my will, before their own sole and separate use, and not subject to the disposal of any husband; nor to set, let, or assign any part of the premises thereof; and that upon the payment of money that arises from my real or personal property of what nature soever, that *E. S. Houghton* or *C. Griffith*, their receipt only shall be a discharge for the money received; then from and after the decease of my two nieces, *E. S. Houghton* and *C. Griffith*, and failure of their male issue, and satisfying my before-mentioned gifts and bequeath, my trustees shall hold in trust for the use of *E. S. Houghton* and *C. Griffith*, my two nieces, their grand-daughters, when they attain the age of twenty-one years, or be married with the approbation

approbation and consent of their mother and my trustees, and not having such approbation and consent, their share to be divided among the remainder, and as my two nieces by their will or deed in writing shall direct or appoint, then to the use of such child or children, and the profits arising from my real and personal estates, of what nature or kind soever, shall accumulate and be laid out and invest the same in stock or public funds, on real or government security at interest, and the produce thereupon due or to become due, and securities in which the same shall be then invested, among all and every the child and children of my said two nieces, Mrs. S. Houghton and Mrs. C. Griffith; and my meaning is, that if Miss Eliza Griffith marry and have issue, that Eliza Griffith and her children share in this my bequeathment equally with Mrs. S. Houghton, but not till after the decease of my two nieces, and if this happen, my trustees allowing what they shall judge proper for their maintenance and education of such child or children, till they arrive at the age before mentioned; and my will is, that every such child who shall take my estate by virtue of this my will, shall take my surname, without the addition of any other surname, and shall inhabit the *Barton House*, and make it their residence and place of abode. Also I give and bequeath to my two nieces, *E. S. Houghton* and *C. Griffith*, all my plate, linen, china, household furniture, of what nature, kind soever, as well in or about my dwelling-house at the *Barton* or elsewhere, upon trust during their natural lives, the use and enjoyment of all such, and after their decease to the use of such son or sons and daughters as my will directs, as shall from time to time come into the possession of my estates and inhabit the *Barton House*,

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Houston
against
Hawkes.

and

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*Houston
against
Houston.*

and also as often and from time to time renew the *Barton* lease, which is every seventh year, and also as often as the lives do fall in the lease of *Colwall Park*, that it be renewed, and three lives kept up to preserve it; and that all the building be kept in repair, and what is expended in needful repairs to be paid out of the rents and profits of the estate; and my will is, that whatsoever of my personal estate that comes to my two nieces, *E. S. Houghton* and *C. Griffith*, of my plate, linen, household goods, and furniture, of any kind, in my dwelling-house at the *Barton* shall remain, and after their decease to be for the use of such child, sons or daughters, that comes to the possession of my estate by virtue of this my will. But in case of failure of issue male, I devise to the female grand-daughters of *E. S. Houghton* and *C. Griffith*, grand-daughters. Then my will is that my trustees shall hold in trust all my lands, tenements, real and personal estates, after satisfying the before-mentioned gifts and bequeaths in trust for the use of such grand-daughters of *E. S. Houghton* and *C. Griffith*, as are then living as tenants in common, and not as joint tenants; and if this happens, and any dispute to cause a difference of the bequeath of this my will, I direct that my said trustees do admit my bequeath, and determine absolute the same, and those that reject my bequeath be void, and their so avoidable and divided equally between such daughters as then living. And I do appoint my two nieces, *E. S. Houghton* and *C. Griffith*, executrix of this my last will and testament."

The testator was, at the time of making his will, and thence up to and at the time of his death, seised of divers freehold lands and hereditaments, for an estate of inheritance

heritance in fee simple in possession, and of divers copyhold lands and hereditaments, held of the manors of *Barton, Colwall, Coddington, and Bosbury Colwall*, in the county of *Hereford*, according to the custom of the said manors respectively, and of lands and hereditaments for the lives of certain persons named in the leases or grants thereof; and was also, at the time of his death, possessed of lands and hereditaments which had been demised to him for terms of years. All the testator's copyhold lands had been duly surrendered to the use of his will.

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HOUSTON
against
HUGHES.

The testator died on the 25th *March 1814*, without having altered or revoked his will, leaving Dame *Susannah Pritchard Tempest*, the wife of Sir *Henry Tempest*, baronet, his only child and heiress at law, customary heiress and sole next of kin. The plaintiff *Elizabeth Houston*, who is the person designated in the will as *Mrs. Sheen Houghton*, and the plaintiff *Charlotte Griffith*, who is the person designated in the will as *Charlotte Griffith*, were then and still are the only surviving children of the testator's sister, *Ruth Leay*, and they duly proved the testator's will.

At the date of the will, and at the time of the death of the testator, *Elizabeth Houston* had only one child, *Elizabeth Strong*, then and now the wife of *Joseph Strong*: and *Charlotte Griffith* also had only one child, *Eliza Griffith*. *Mrs. Strong* had, at the testator's death, three children, viz. *Elizabeth Charlotte Strong*, *Elinor Beresford Strong*, and *Ann Strong*, and she has since had two children, viz. *Susannah Strong* and *Charlotte Sarah Strong*, all of whom are now living. *Eliza Griffith*, after the testator's death, intermarried with *Nicholson*

Peyton,

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 against
 Hussey.

Peyton, and has the following children: *Charlotte Leay Peyton, Reynolds Peyton, Thomas Griffith Peyton, Henry Peyton, Francis Peyton, William Peyton*, and *Elizabeth Peyton*. No child of Mrs. Strong or of Mrs. Peyton has attained twenty-one or married.

Dame *Susannah Pritchard Tempest* survived her husband, and died on the 31st of July 1821, without issue, and intestate as to her freehold estates, leaving the plaintiffs *Elizabeth Houston* and *Charlotte Griffith* her co-heiresses at law and sole next of kin.

On the 12th of February 1825 letters of administration of the goods, chattels, rights, and credits of the said Dame *Susannah Pritchard Tempest*, with her will annexed, were granted, by and out of the prerogative court of the archbishop of Canterbury, to *Thomas Lessingham*, and he is now the legal personal representative of the said Dame *Susannah Pritchard Tempest*.

On or about the 20th of August 1822, the said plaintiffs filed their original bill in the High Court of Chancery against the defendants hereinbefore in that behalf named, and the said *John Platt* (since deceased), praying, amongst other things, that the will of the said testator might be established, and the rights of the several parties claiming thereunder declared, and that the plaintiffs might be declared under the will entitled to all and singular the messuages or tenements, farms, lands, hereditaments, and premises of which the testator died seised and possessed or entitled to in fee as tenants in common in tail male, and to all and singular the said copyhold and leasehold estates, and also to the whole of the personal estate and effects of the testator, subject only to the payment of his just debts and funeral and testamentary

testamentary expences and legacies, according to the several natures thereof, for their own use absolutely, in equal moieties; to which bill the defendants appeared and put in their answers. The said original bill was subsequently amended, and afterwards bills of supplement and revivor were filed to bring the necessary parties before the Court; and the original cause, and also the supplemental and revived causes being at issue, came on to be heard before the Master of the Rolls, on the 5th of July 1826, when his lordship directed the above case to be made for the opinion of the Judges of this Court, and that the questions should be,

First: What estate and interest did the said *Abraham Robarts, Henry Hughes, and John Platt* take under the will of the testator in the freehold and copyhold lands and hereditaments in which the testator had at the time of his death an estate of inheritance to him and his heirs, and in the lands and tenements which were then held by him on leases for the lives of certain persons in the leases in that behalf named?

Secondly: What estate and interest do the plaintiffs *Elizabeth Houston and Charlotte Griffith* respectively take under the will of the testator in the said freehold and copyhold lands and hereditaments, and in the said leaseholds for lives?

Thirdly: What estate and interest do the said *Reynolds Peyton, Thomas Griffith Peyton, Henry Peyton, and William Peyton*, the sons of the said *Eliza Peyton*, respectively take under the will of the testator in the freehold and copyhold lands and hereditaments, and in the leaseholds for lives respectively?

Fourthly: What estate and interest do the said *Elizabeth Charlotte Strong, Elinor Beresford Strong, Ann Strong*,

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Strong, Susannah Strong, and Charlotte Sarah Strong, the grand-daughters of the said *Elizabeth Houston*, and *Eliza Peyton*, the daughter, and *Charlotte Leay Peyton* and *Elizabeth Peyton*, the grand-daughters of the said *Charlotte Griffith*, respectively take under the will of the testator in the said freehold and copyhold lands and hereditaments, and in the said leaseholds for lives respectively?

If the Court should be of opinion, that by the will, as above stated, the whole legal estate in fee simple in the aforesaid lands and hereditaments of inheritance, and the whole absolute interest in the leaseholds for lives, were vested in the said *Abraham Robarts, Henry Hughes, and James Platt*; then in case they had been merely devisees to the uses, and the legal estate had not remained in them,

Fifthly: What estate and interest would the persons enumerated in the second, third, and fourth questions have respectively taken under the will of the said testator in the said freehold and copyhold lands and hereditaments, and in the said leaseholds for lives respectively?

The case was argued at the sittings in Banc after last Hilary term, by *Denman C. S.* for the plaintiffs, *Preston* for their grand-daughters, *Alderson* for the grandsons, *Campbell* for the trustees, and *O. Russell* for the defendant *Thomas Lesingham*.

In the early part of the argument, *Bayley J.* asked *Denman* whether this Court were expected to certify what estates the plaintiffs would have taken if the legal estates had not remained in the trustees. *Denman* said that the Court did so certify in *Murthwaite v. Jenkinson* (*a*), and

(*a*) 2 B. & C. 357.

that

estions in this case were framed in a similar
the purpose of obtaining the opinion of this
at supposition. *Bayley* J. said, the old
for the Court of Chancery to state the
es were legal estates ; and that he felt
ing that a court of law should give
ould have been the effect of the
able devises had been legal devises.
s invariably was, so to mould the case in a
equity as to present it to a court of law as a
legal question.
r this intimation from the Court, the only question
ed was, Whether the trustees took the legal fee
freehold estates ?

man C. S., *Preston*, and *E. H. Alderson* con-
, that the legal fee in the freeholds was vested in
steees. The arguments used by them were in sub-
as follows. The freehold, the copyhold, the lease-
and the personal estates all form one property,
ey are kept together by the testator. The legal
the copyholds must remain in the trustees, be-
copyholds are not within the statute of uses, and
re, however formally given, the legal estate cannot
ted in the cestui que use. The trustees must also
ne whole interest in the leaseholds for lives, for they
renew, and they cannot do this with effect, unless
ave the whole estate in them ; because in dealing
eligious and other corporate bodies, an effectual re-
can only be obtained by a surrender of the former
nd that cannot be done by a person who has a par-
interest only. It is also clear that the trustees had
al estate *for some period* in the whole of the testa-
tor's

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tor's property. The trust for the separate use of the married women would, beyond all doubt, give it to them. Then it remains to be ascertained whether there are any directions in this will referable to the freehold estates (without saying any thing as to the copyhold estates or leaseholds for lives), which shews that the trustees were to take the whole estate in fee; for if it were necessary for them to have the fee for any one purpose, that alone would be sufficient to give it in the will which require that the trustees should have the fee. They are to pay legacies to the grandchildren as well as to other parties; and if there had been no personal estate, the real estate would have been chargeable with legacies, and then the trustees could not have paid the legacies, except by means of having the legal fee in them. The testator directs, that all his debts, funeral and testamentary expences, should be fully paid and satisfied. Those payments, also, would be a charge on the real estate. They are imposed upon the trustees as a duty, and if they be so imposed upon them as a duty, that is an additional circumstance to shew that the legal estate given to them in the first part of the will, is to continue to all time for the purpose of carrying the will into effect. The clause which directs, "that the trustees should have full power and authority to release, convey, assign, and assure," is restricted to the mortgage and the trust estates; but it shews that the testator contemplated, that they possessed the whole fee of the estates. Then comes the clause by which the testator directs, "that the trustees shall hold all his tenements, real and personal property of what kind nature soever, and all his estate and interest in it

be holden by his trustees in trust." The testator having previously given the legal fee to them, at all events, as devisees to uses, these latter words are most important, because in this the declaratory part of the will, he is declaring a trust of the whole estate, and he uses the words, "all my estate and interest in the same;" that is a description of the fee in the freeholds and copyholds, of the whole term in the leaseholds for lives, and of the absolute property in the personal estate. He then directs, that in a certain event the rents and profits of the estate are to accumulate, to be laid out by the trustees, and that the buildings are to be kept in repair; and that what is expended in needful repairs shall be paid out of the rents and profits of the estate. In *Shapland v. Smith* (a), such a provision was held sufficient to give the legal estate. It is evident that the repairs were to be done by them not only during the life estates, but during the whole time that they were to have the legal estate. The word *estate* in this clause applies not to leasehold, but to the whole estate, and they are to be paid out of the rents and profits of *the estate*. The trustees, also, are to adjust the shares, and ascertain the rights of the parties. Besides, they are to give the income and annual amount of the property to the testator's two nieces, *E. S. Houghton* and *C. Griffith*, for their lives; and then, from and after the decease of the two nieces, and failure of their male issue, &c., the testator directs that the trustees shall hold in trust for the use of *E. S. Houghton* and *C. Griffith*, his two nieces, their grand-daughters, when they attain the age of twenty-one years. So that there would be an interval of time during which the trustees were to hold the real

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(a) 1 Bro. Cha. C. 75.

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and personal estates, and during that interval they are to accumulate in their hands (for the bequest to the grand-daughters does not take effect till they attain twenty-one years, or are married with the approbation and consent required); and, in the meantime, the profits arising from the real and personal estate are to accumulate and to be invested in the public funds, and the trustees are to apply what they may think proper for the maintenance and education of the children till that time. These were acts to be done by them subsequently to the death of Mrs. *E. S. Houghton* and Mrs. *Griffith*, and that clearly gave them the legal fee. *Doe v. Hicks* (*a*) shews, that in a case of a devise to trustees and their heirs, in trust for tenants for life with remainders over, if any thing remains to be done by the trustees after the death of the tenants for life, then the trustees take the fee; and *Doe v. Willan* (*b*) establishes, that in such a case they take the fee, unless a contrary intent is to be clearly collected from other parts of the will.

O. Russell for the defendant, *Thomas Lesingham*. The trustees under the will took an estate for the lives of *E. S. Houghton* and *C. Griffith*, and the devises after those life estates are void for uncertainty. It must be conceded, that, unless the subsequent devises be void for uncertainty, there are sufficient grounds for saying that the trustees took the legal fee. It is impossible, however, to give any sensible construction to the subsequent parts of the will. The clause where the testator says, "in trust and confidence that my trustees

(a) 7 T. R. 433.

(b) 2 B. & A. 84.

shall

shall hold all my lands, &c. and all my estate and interest in the same to be holden by my trustees in trust, and then apply the income and annual amount of such property to the use of my two nieces, *E. S. Houghton* and *C. Griffith*, for their lives, and proper use and benefit; and after their decease to such child, or if more than one, to the use of such children, in manner following: to wit, if male issue of my niece *Mrs. S. Houghton's* daughter *Mrs. Strong*, then I give and devise to my trustees that they shall hold all my lands in trust and confidence, that they shall hold my will or whatsoever of my real estate," &c. is unintelligible. The supposition of male issue of *Mrs. Strong* is never followed up in any way whatever. [*Bayley J.* From and after the decease of the two nieces, *E. S. Houghton* and *C. Griffith*, and failure of their male issue, the testator gives it to their daughters; and the question will be, whether that will not raise by implication a limitation in favour of the male children of *Mrs. Houghton* and *Mrs. Griffith*; and if there is an estate raised by implication in favour of the male issue, then there is a direct limitation in favour of the female.] The only daughter of the nieces married at that time was *Mrs. Strong*, and the testator seems not to have contemplated any other male issue but that of *Mrs. Strong*, and the male issue of *Mrs. Strong* is not adverted to again. [*Bayley J.* In case of failure of male issue of *Mrs. Houghton* and *Mrs. Griffith*, then the trustees are to hold for the use of such of the granddaughters as shall be at that time living.] The testator's supposition was of male issue of *Mrs. S. Houghton's* daughter, *Mrs. Strong*, who had several daughters, but never had any male issue. He does not act upon

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this supposition by giving any further direction, but proceeds to suppose a case of failure of male issue of both nieces, Mrs. *Houghton* and Mrs. *Griffith*, and in such event creates certain trusts. There is nothing, therefore, to shew what the testator intended if there had been male issue of Mrs. *Strong*. In point of fact, Mrs. *Houghton*'s daughter, Mrs. *Strong*, had four or five daughters. *C. Griffith* had a daughter, *Eliza Peyton*, and she had a daughter and four or five sons. Now, with respect to these children, there is nothing in the will to shew how they are to take. It is perfectly clear that the testator had at one time an intention of giving something to the male issue of Mrs. *Strong*. Now suppose Mrs. *Strong*'s daughters to have sons, what will be the construction? Would there be a failure of male issue or not within the meaning of the testator? Or suppose a grand-daughter to have sons, would there be a failure of male issue? When will this estate vest? Neither Mrs. *Houghton* nor Mrs. *Griffith* have sons; but one of them, Mrs. *Griffith*, has grandsons. Mrs. *Houghton* has only grand-daughters, but those grand-daughters may have sons. Is the construction to be that the grandsons of Mrs. *Griffith* only are to take, and that the words "male issue" will not apply to any of the descendants of Mrs. *Houghton*? Such a construction would have the effect of taking the estate entirely from the descendants of Mrs. *Houghton*, and giving it to the male descendants of Mrs. *Griffith*. It is impossible that any certain meaning can be given to this clause. Besides, the testator directs, that in a particular event the grand-daughters are to have such shares as they the two nieces shall by their will or deed direct. The testator, therefore, supposes a joint will

will to be made by the two women, in order to direct that appropriation. [*Bayley* J. I think that the fair meaning of it is this: the grand-daughters are to take at twenty-one, or marriage, if they marry with consent; but if they marry before twenty-one without consent, then the share of such person who shall so marry shall be divided among the remainder, as the niece, the mother of the grand-daughters marrying without consent, shall direct.] Suppose one of the two nieces to be dead, and the marriage not to be with the consent of the trustees, there will be another difficulty; a joint will could not be made under this clause. [*Bayley* J. Then that share would be divided among the remainder; for the power of appointment would then be gone; it would be destroyed by the death of the mother.] Then comes the accumulating clause, which directs that the produce of the accumulation shall be divided among all the children, without excepting those who might have been deprived of their share by marrying without the required consent. [*Littledale* J. It does not follow, because there are difficulties in carrying a will into effect, that it is therefore void for uncertainty. There are great difficulties in this will; but I cannot say, that, after giving the life estates to the nieces, the whole is so insensible that it is void for uncertainty.] [*Bayley* J. It may be useful that the whole legal estate should remain in the trustees. Although there may be difficulties as to the execution of certain trusts, those difficulties will not be of the same importance as if there was a difficulty as to the legal estate. An interruption in the case of a trust would not, I apprehend, destroy or prevent a subsequent trust from arising. But the extinction of a par-

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ticular estate of course destroys every contingent remainder; but if the whole fee is vested in the trustee, that will not happen. May not the very existence of the difficulty in this case raise an argument to shew that the trustees took the whole legal fee?] Undoubtedly, if the difficulties suggested as to the construction of the will be a ground for saying that the legal fee is in the trustees, there is an end of the argument.

Campbell for the trustees, said, that it was their wish that the Court would so construe the will as to give them no more than an estate for life; and that if the case had been argued adversely as to the different estates taken by the grandsons, by the grand-daughters, and the other claimant, there would have been so much difficulty in construing the will, that the Court would have found it necessary to determine that the devises subsequent to the estates for life were void for uncertainty.

BAYLEY J. When a court of equity sends a case for the consideration of a court of law, it is not that the court of law is to bind the court of equity, but to assist it in coming to a conclusion on the subject. But a court of law sits for the purpose of giving opinions upon *legal* questions only. If a will is so framed as to present for consideration questions upon equitable estates, it is peculiarly for a court of equity to say in what manner that will should be moulded, so as to present a legal question for the consideration of a court of law. And if there be any difficulty in converting the equitable estates in the will into legal estates, that is for the consideration

sideration of a court of equity, where the effect of equitable devises is understood. It seems to me, that if the court of equity wish to have our opinion as to those parts of this will which give equitable interests, it is for that court so to mould the will as to present a legal question for our consideration. If therefore we should be of opinion in this case that the legal estate in fee is vested in the trustees, we shall certify to that effect to the court of equity, and forbear answering the other questions. Upon the question, whether the trustees take the legal fee or not, I think that, according to the case of *Doe v. Willan* (*a*), where an estate is given to trustees and their heirs indefinitely, the trustees will take the fee, if the purposes of the trust require that they should have the absolute property in them, or that they should take it for an indefinite period of time, unless a contrary intent is manifested on the face of the will. Now in this case, the freehold property being mixed with property in which the trustees must have the whole interest, is a circumstance which may assist the Court in determining whether the trustees take the whole fee or less than the fee. In this instance they must take an absolute interest, both in the copyholds and in the leaseholds for years; and if they do not take an absolute interest in the freeholds of inheritance and the freeholds for life, the consequence would be, that the one would be separated entirely from the other, which would be directly contrary to the intention of the testator. We will, however, certify our opinion to the Court of Chancery.

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(*a*) 2 B. & A. 84.

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The following certificate was afterwards sent:

This case has been argued before us by counsel. We have considered it, and we are of opinion, that the said *Abraham Robarts, Henry Hughes, and John Platt*, took under the will of the testator an estate in fee simple, in the freehold and copyhold lands and hereditaments in which the said testator had, at the time of his death, an estate of inheritance to him and his heirs. And we are of opinion that the said *Abraham Robarts, Henry Hughes, and John Platt*, took the whole interest which the said testator, at the time of his death, had in the lands and tenements which were then held by him on leases for the lives of the persons in the said leases in that behalf named. As we are of this opinion, the interests of the other parties mentioned in the questions are equitable interests only, and we have not given any opinion as to them.

J. BAYLEY.

G. S. HOLROYD.

J. LITTLEDALE.

*Wednesday,
May 2d.*

COATES and Another against RAILTON and Another.

Goods were purchased by a commission agent at Manchester for A. to be sent to Lisbon. A. had no warehouse

at Manchester, and the vendor delivered the goods to the commission agent, who was to forward them to Lisbon. Held, that the transitus continued until they reached Lisbon, the place named by the vendee to the vendor as the place of ultimate destination, and that the latter had a right to stop them in the hands of the agent, the vendee having become insolvent.

at

at *Manchester*. The defendants were commission agents also resident at *Manchester*. *James Butler, Richard Butler, and Robert Butler* were *Lisbon* merchants, carrying on trade in *London* under the firm of *Butler, Brothers*, and in *Lisbon* in copartnership with one *Krus*, under the firm of *Butler, Krus, and Co.* The course of dealing between the parties was this: when *Butler, Krus, and Co.* required goods to be purchased for them at *Manchester*, they addressed a letter to the defendants under cover to *Butler, Brothers, London*. The latter transmitted the same to the defendants, and they purchased the goods in the name of *Butler, Brothers*, and usually forwarded them by *Liverpool* to *Lisbon*, to *Butler, Krus, and Co.* The seller then drew on *Butler, Brothers*, at three months, for the amount. On the 7th of *January* 1826, the defendants received a letter from *Butler, Brothers*, enclosing one from *Butler, Krus, and Co.* of 19th *December*, with an order to the defendants to purchase on their account 500 pieces of printed calicoes, and on the following day they purchased the same of the plaintiffs in the name of *Butler, Brothers*, and informed the plaintiffs they were to be sent to *Lisbon*, as on former occasions. The 500 pieces were delivered on the 28th of *January* to the defendants at their warehouse in *Manchester*, with an invoice making *Butler, Brothers*, debtors. The defendants sent them to their calendar-man, who calendered them, made them up, and returned them to the defendants on the 31st of *January*. They were to forward them to *Liverpool*, to be shipped to *Butler, Krus, and Co., Lisbon*. Neither *Butler, Brothers*, nor *Butler, Krus, and Co.* had any warehouse at *Manchester*. A bill was drawn by the plaintiffs, for the amount, upon

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Butler, Brothers, on the 1st of *February*, at three months' date, and transmitted to *London*; but it was dishonoured. *Butler*, Brothers, stopped payment on the 6th of *February*, and a commission was afterwards sued out against them, under which they were declared bankrupts. The goods remained in the defendants' warehouse at the time when intelligence reached *Manchester* that *Butler*, Brothers, had stopped. The plaintiffs claimed them, but the defendants refused to give them up. Lord *Tenterden* was of opinion that as *Lisbon* was the ultimate destination of the goods, they continued to be in transitu while they were in the warehouse of the defendants, and that the plaintiffs therefore had a right to stop them. A verdict having been found for the plaintiffs for the value of the goods,

Denman now moved to set it aside and enter a nonsuit, and contended that by the delivery of the goods to the defendants, who united in themselves the characters of factors and warehousemen, the transitus was at an end, neither *Butler*, Brothers, nor *Butler, Krus, and Co.* having any warehouse in this country; and he cited *Leeds v. Wright* (a), *Dixon v. Baldwin* (b), and *Rowe v. Pickford* (c), to shew that where the insolvent has no other warehouse or place of delivery than the warehouse of a packer or other agent, the transitus is at an end as soon as the goods arrive at that warehouse. In *Dixon v. Baldwin* the goods were ordered of a cotton dealer at *Manchester*, to be by them forwarded to *Metcalf* at *Hull*, for the purpose of being shipped for *Hamburg*, and it was held that the transitus was at an end.

(a) 3 Bos. & Pul. 320.

(b) 5 East, 175.

(c) 8 Tount. 83.

Lord

LORD TENTERDEN C. J. The goods in question were purchased of the plaintiffs by the defendants, as agents, in the name of *Butler, Brothers*, but in fact for *Butler, Krus, and Co.*, to be sent to the latter at *Lisbon*. The defendants were packers and warehousemen, as well as the general agents of the purchasers. If they had been mere warehousemen, it is quite clear that as the goods were purchased of the vendors, to be sent to *Lisbon*, the latter would have had a right to stop them, so long as they were in a course of conveyance to *Lisbon*. I thought that the fact of the defendants in this case having been the general agents of the purchasers as well as warehousemen, did not make any difference; and the goods having been delivered to them by the sellers, for the purpose of being forwarded to *Lisbon*, the transitus in this case was not at an end, and that the plaintiffs had a right to stop them.

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BAYLEY J. It is a general rule, that where goods are sold to be sent to a particular destination named by the vendee, the right of the vendor to stop them continues until they arrive at that place of destination. In the several cases cited, the goods purchased were sent to the place where the vendee directed them to be sent. In *Rowe v. Pickford* (a), a trader in *London* was in the habit of purchasing goods at *Manchester*, and of exporting them to the continent soon after their arrival in *London*. He had no warehouse in *London*, and the goods consigned to him usually remained in the waggon office of the defendants, who were carriers, until they were removed for the purpose of being shipped. The trader

(a) 8 *Taunt. 83.*

purchased

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purchased a parcel of goods at *Manchester* for the purpose of exportation, and the same were sent by the waggon to *London*, and remained in the waggon office at the time of the vendee's bankruptcy. It was held that the transitus was at an end. But in that case the vendor had sent the goods to the place where he was directed by the vendee to send them, and it was then at the option of the latter to send them to any place on the continent. There was no ulterior place of destination named to the vendor. The decision there proceeded on the ground, that the carrier's warehouse was the warehouse of the buyer, and as between him and the seller the place of ultimate destination, although the actual place of the ultimate destination of the goods was not to be fixed by the buyer until they reached the carrier's warehouse. In *Leeds v. Wright* (*a*), the goods were bought by an agent in *London* for his principal, who resided abroad, and they were sent to a packer in *London* by directions of the agent, he having a general authority to export them either to *France*, *Holland*, or *Germany*, or to any other market; and it was held that the transitus was at an end. But there the vendor had sent the goods to the only place mentioned by the buyer; and as between buyer and seller there was no place of ulterior delivery in view. In *Dixon v. Baldwin* (*b*), *A.* a trader, being in *London*, was in the course of ordering goods of cotton manufacturers in *Manchester* to be sent to *Metcalf and Co.* at *Hull*, for the purpose of being afterwards sent to the correspondents of *A.* at *Hamburg*. *A.* sent orders to the defendant for goods to be sent to *Metcalf and Co.* at *Hull*, to be shipped for

(*a*) 2 *Bos. & P.* 520.(*b*) 5 *East*, 175.*Hamburg.*

Hamburg. The goods had so far gotten to the end of their journey, that they waited for new orders from the purchasers to put them again in motion, and to communicate to them another substantive destination ; without such orders they would have continued stationary. The principle to be deduced from these cases is, that the transitus is not at an end until the goods have reached the place named by the buyer to the seller, as the place of their destination. Here the place named by the buyer to the seller was *Lisbon*, and not the defendants' warehouse. I think that the goods were in transitu while they continued in the possession of the defendants, and that the vendors had a right to stop them.

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HOLROYD and LITTLEDALE Js. concurred.

Rule refused.

HOWELL against HOWELL.

Thursday,
May 3d.

THIS cause was tried at the Summer *Carmarthen* great sessions 1826 before Mr. Serjt. *Heywood*, and the plaintiff was nonsuited. A rule nisi was obtained in *Michaelmas* term for setting aside the nonsuit. The transcript of the record had been duly transmitted from the court of great sessions to the Court of King's Bench, pursuant to the statute 5 G. 4. c. 106. s. 3., though judgment had been signed in this case at the Summer great sessions 1826. But no recognizance conditioned to make and prosecute the application for the new trial or setting aside the nonsuit, and to pay the costs, had been entered into as required by the fourth

section

A party in an action, tried before the court of great sessions in *Wales*, may move for a new trial without entering into the recognizance required by the statute 5 G. 4. c. 106. s. 4.

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section of that statute. These facts now appearing upon affidavit,

Sir *W. Owen* moved to have the case struck out of the new trial paper, and to discharge the rule for setting aside the nonsuit, on the ground that it was not competent to a party to move for a new trial after judgment in a case tried before the courts of great session, unless the recognizance required by the fourth section were entered into. He admitted that it was not expressly enacted that new trials should not be moved for unless such recognizance were entered into; but that was obviously the intention of the legislature; for judgment and execution cannot be stayed unless such recognizance be given. Great inconvenience will arise from allowing new trials to be moved for after judgment and execution, and after the property in the goods taken in execution has been changed. Besides, the act enables parties to apply for new trials in the same manner as had been usually theretofore done in actions depending in the courts at *Westminster*. Now in those courts a new trial cannot be moved for after judgment and execution.

Lord TENTERDEN C. J. The second section of the 5 G. 4. c. 106. enables any party dissatisfied with any verdict in any action tried in any of the courts of great sessions to apply to any of the common law courts of *Westminster* for a new trial, and it authorizes those courts to grant a rule for a new trial in the same manner as had been usually theretofore done in actions depending in the said courts, and tried at Nisi Prius before a Judge of assize. Now in the courts of *Westminster*, the application for a new trial must be made within the first four

four days of term before any judgment is signed; but in actions tried before the courts of great sessions, the judgment is signed at the sessions, and therefore it is impossible for a person dissatisfied with a verdict to apply to any of the common law courts at *Westminster* before judgment is signed, and the consequence of that might be that execution might issue upon the judgment before the party had any opportunity of making his application. The fourth section, in order to remedy this inconvenience, enacts, that "nothing in the act shall be construed to extend to stay or delay the entering up judgment which shall have been given in any action in the courts of great sessions, and suing out execution thereon, unless the party intending to apply for a new trial thereof enter into the recognizance therein mentioned." The effect of his omitting to enter into a recognizance will be that execution may issue against him upon the judgment obtained in the courts of great sessions. But this clause does not deprive him of the right given by the former section to apply to the courts of *Westminster* for a new trial. If he afterwards succeed upon a second trial, and obtain judgment, he will be in the situation of a plaintiff in error, who, if the judgment be reversed, is restored to all he has lost by occasion of the judgment, and has a writ of restitution awarded to him.

Rule refused.

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Thursday,
May 3d.

VAVASOUR *against* ORMROD.

If a declaration profess to set out the terms of a reservation of rent, in an action of debt for the rent, it is a variance to omit an exception referring to a subsequent proviso, by which a deduction is to be made if a certain event happen, although that event have not happened.

DECLARATION stated, that by a certain indenture between the plaintiff and one J. S. (profert of which was made) plaintiff did demise, lease, and set unto J. S., his executors, administrators, and assigns, certain tenements, to hold, &c. "yielding and paying therefore the yearly rent of 160*l.*, by two even and equal portions in each and every year during the said term, "that is to say, on, &c." as by the said Indenture, reference thereunto being had, would more fully and at large appear. The entry of J. S. was then stated; his assignment to the defendants, their entry, and that rent had accrued for certain periods since. Plea, nil debet. At the trial before Hullock B., at the last Lancaster Spring assizes, the reservation of rent appeared, on the production of the indenture, to be in the following words: "yielding and paying during the said term (except as hereinafter mentioned); and then the reservation was as stated in the declaration. In a later part of the lease was a covenant, that the lessor should lay out 600*l.* in erecting a steam-engine. In a still later part was a proviso, that in case the lessee should, within three years, pay the lessor 300*l.*, in part discharge of the 600*l.* so to be laid out by the lessor, then the rent of 160*l.* should be reduced to 130*l.*; and that if the remaining 300*l.* were paid within six years, the rent should be reduced to 100*l.* No evidence of payment of any part of the 600*l.* was given. It was objected by Scarlett and

and *Parke*, on the part of the defendant, that there was a variance. It was, they contended, clearly established, that upon a plea of non est factum to a lease, an exception in a reservation or covenant, not noticed, creates a variance, although a distinct proviso, if not insisted upon, need not be noticed (*a*); and that although the proviso itself in this case were a distinct one, the exception referring to it was in the body of the reservation, which reservation must, therefore, be read as if it had contained the proviso in the form of an exception; that this, therefore, would have been a variance on a plea of non est factum and that nil debet put in issue the execution of the indenture stated in the declaration as much as a plea of non est factum. On the part of the plaintiffs it was admitted that the reservation should be read as if it contained the proviso in the form of an exception, but it was contended that the distinction between a proviso and an exception did not depend upon the mere form of expression; and that this was a proviso in its nature, for the event might or might not occur; and here it actually had not occurred. The supposed exception was to be a nullity, except on the occurrence of a particular event; and as that had not occurred, it was a nullity, and was properly omitted in the recital of the reservation set out. In instruments in general, no more need be noticed in the declaration than that upon which the plaintiff proposes to rely. The learned Judge was of opinion that this was an exception; and that as by the terms of the reservation the whole rent was to be paid only under particular circumstances, such a limitation should have been noticed; although a proviso for a distinct purpose, as for re-entry on non-pay-

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(*a*) 1 *Savnd.* 234. note (S) c. 5th edit.

ment,

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ment, would stand on a different ground. The plaintiff was therefore nonsuited.

F. Pollock now moved to set aside the nonsuit, and contended, that the clause in the subsequent part of the lease referred to in the reddendum was a proviso, and not an exception, and that it was unnecessary for the plaintiff to declare upon any more of the deed than the reservation; and it was for the defendant to shew the proviso which was in defeasance of the covenants. He cited *Elliott v. Blake* (*a*), *Hotham v. The East India Company* (*b*).

Lord TENTERDEN C. J. If an act of parliament or a private instrument contain in it, first, a general clause, and afterwards a separate and distinct clause, which has the effect of taking out of the general clause something which would otherwise be included in it, a party relying upon the general clause in pleading may set out that clause only, without noticing the separate and distinct clause which operates as an exception. But if the exception itself be incorporated in the general clause, then the party relying upon it must in pleading state it with the exception; and if he state it as containing an absolute unconditional stipulation, without noticing the exception, it will be a variance. This is a middle case. Here the exception is not in express terms introduced into the reservation, but by reference only to some subsequent matter in the instrument. The words are "except as hereinafter mentioned." The rule here applies "verba relata inesse videntur." And

(*a*) 1 *Lev.* 88.

(*b*) 1 *T. R.* 638. 645.

then

the clause *thereinafter mentioned* must be considered as an exception in the general clause, by which the rent is reserved; and then, according to the rule above laid down, the plaintiff ought in his declaration to have stated the reservation and the exception. Not having done so, I am of opinion that the variance is fatal, and that there is no ground for setting aside the nonsuit.

Rule refused.

1827.

VAVASOUR
against
OLMROD.

EDIS against BURY.

*Friday,
May 4th.*

A SSUMPSIT for sheep, lambs, and cattle sold and delivered by the plaintiff to the defendant at his request. Plea, general issue. At the trial before Lord Tenterden C.J. at the last *Middlesex* sittings, the plaintiff proved that he had sold to the defendant cattle to the value of 78*l.* 10*s.*; but it further appeared that the defendant gave the plaintiff in payment of that sum a bill of exchange for 35*l.* 2*s.*, which was duly paid, and the following instrument for 44*l.* 11*s.* 5*d.*, which was not paid:—

Where an instrument is made in terms so ambiguous as to make it doubtful whether it be a bill of exchange or a promissory note, the holder may at his election (as against the maker of the instrument) treat it as either.

“ 44*l.* 11*s.* 5*d.*

“ London, 5th August 1826.

“ Three months after date, I promise to pay Mr. John Bury, or order, forty-four pounds eleven shillings and five-pence, value received.

“ J. B. Grutherot, “ JOHN BURY.”
“ 35. Mountague Place, (Indorsed) “ JOHN BURY.”
“ Bedford Square.”

Grutherot's name was also written across the instrument.

1827.

 Edes
against
Bury.

It was contended that this was a bill of exchange, and that the plaintiff was bound to prove that he had given due notice of the dishonour of the bill to the defendant. On the other hand, it was insisted, that it was a promissory note, and that the defendant, as the maker, was at all events liable upon it as such. Lord *Tenterden* reserved the point, and the jury found a verdict for the plaintiff.

Campbell now moved to enter a nonsuit. In *Gray v. Milner* (*a*) an instrument drawn, payable to the drawer or his order at a particular place, without being addressed to any person by name, but which was afterwards accepted by the person residing at the place where it was made payable, was held to be a bill of exchange; and in *Allan v. Mawson* (*b*) it was held that an instrument which on common observation appeared to be a bill of exchange, might be treated as such, though words were introduced into it, for the purpose of deception, which might make it a promissory note. There the bill was drawn by *Mawson*, and contained a request to the drawers to pay; but the word *at* was written in very small letters before the names of the drawees, and they refused to pay it. In *Shuttleworth v. Stevens* (*c*) it was held that an instrument in the common form of a bill of exchange, except that the word *at* was substituted for *to*, before the name of the drawees, might be declared upon as a bill of exchange. Lord *Ellenborough*, indeed, was of opinion, that it might also be pleaded as a promissory note, at the option of the holder. If this were a promissory note, it was unnecessary to insert in it the name of *J. B. Grutherot*.

(*a*) 8 *Taunt.* 739.(*b*) 4 *Campb.* 115.(*c*) 1 *Campb.* 407.

Lord

LORD TENTERDEN C. J. This is an instrument at least of a very ambiguous character. In form it is a promissory note, for it contains in terms a promise to pay the sum mentioned in it; but then in the corner of it there is the name of *Grutherot*, and it appears that his name is also written across the instrument. In that respect, although it does not in terms contain a request to *Grutherot* to pay, yet it resembles a bill of exchange. It is an instrument, therefore, of an ambiguous nature, and I think that where a party issues an instrument of an ambiguous nature, the law ought to allow the holder, at his option, to treat it either as a promissory note or a bill of exchange. That being so, I think it was competent to the plaintiff in this case to consider this as a promissory note; and if so, the notice of the dishonour was unnecessary.

1827.

 Enis
against
Bury.

BAYLEY J. I think that this was a promissory note containing an intimation on the part of *Bury*, that he would pay at *Grutherot's* house; and I think also, that where a party frames his instrument in such a way that it is ambiguous, whether it be a bill of exchange or a promissory note, the party holding it is entitled to treat it either as one or the other, and that the plaintiff ought not to be defeated by the party who framed the instrument being allowed to say that it is a bill of exchange.

HOLROYD J. It seems to me that it was the design of the drawer of this instrument to hold out to the party taking it that he might treat it either as a bill of exchange or a promissory note. Besides, the words of an instrument are to be taken most strongly against the party using them; and therefore if there be any ambiguity

1827.

EDIS
against
BUAT.

biguity in the words of this instrument, they ought to be construed favourably for the plaintiff, and against the defendant, who made the instrument. Besides, until *Grutherot* put his name to this instrument, it was clearly in terms a promissory note; and having been once such, the fact of his having afterwards put his name to it as acceptor cannot alter the nature of it.

LITTLEDALE J. It seems to me that this was a promissory note. It begins with the words "I *promise*;" it contains a promise to pay, and that is the form of a promissory note. But it is alleged that there is something at the foot of the instrument which converts it into a bill of exchange; a bill of exchange however is addressed to another person, and contains a request to the drawee to pay the same. In order to make this a bill of exchange, the words "I *promise*" must be rejected; and those words constitute the essential difference between a bill of exchange and a promissory note. I think that they ought not to be rejected. Suppose they were rejected, could this instrument then have been declared upon as a bill of exchange before *Grutherot* accepted it? If it could not, then it was not a bill of exchange at that time; and if it was once a promissory note, *Grutherot*, by putting his name to it, could not make it a bill of exchange.

Rule refused.

1827.

RICHARDS and Another *against* PORTER.*Friday,
May 4th.*

ASSUMPSIT for goods sold and delivered. Plea, non-assumpsit. At the trial before *Vaughan* B., at the last Summer assizes for *Worcester*, it appeared that the plaintiffs, on the 25th of *January* 1826, had sent from *Worcester* to the defendant at *Derby*, an invoice of five pockets of hops, and delivered the hops the same day to the carriers, to be conveyed from *Worcester* to *Derby*, and informed the defendant at the same time that they were so forwarded. The invoice described the plaintiffs as the sellers and the defendant as the purchaser of the hops. The only proof of any note or memorandum of a contract in writing was the following letter of the defendant on the 27th of *February*, addressed to the plaintiffs: "The hops (five pockets) which I bought of Mr. *Richards* on the 23d of last month are not yet arrived, nor have I ever heard of them. I received the invoice: the last was much longer than they ought to have been on the road; however, if they do not arrive in a few days, I must get some elsewhere, and, consequently, cannot accept them." The learned Judge was of opinion, that there was not any note in writing of the contract sufficient to satisfy the statute of frauds, and nonsuited the plaintiff.

A. sent to *B.* on the 25th of *January*, an invoice of five pockets of hops, and delivered the hops to a carrier to be conveyed to *B.* In the invoice *A.* was described as the seller and *B.* as the purchaser of the hops. *B.* afterwards wrote to *A.* as follows: "The hops I bought of *A.* on the 23d *January* are not yet arrived. I received the invoice: the last were longer on the road than they ought to have been; however, if they do not arrive in a few days, I must get some elsewhere." Held, that the invoice and this letter, taken together, did not constitute a note in writing of the contract to satisfy the 17th section of the statute of frauds.

Russell now moved to set aside the nonsuit. The defendant, by his letter, recognizes the contract as a still subsisting contract. He does not in any way falsify it.

G g 3 . In

1827.

 RICHARDS
against
 PORTER.

In *Cooper v. Smith* (*a*) the letter of the buyer falsified the contract. He insisted that the flour was to be delivered within a week. Here the defendant says he had bought five pockets of hops of Mr. *Richards*, but does not allege that it was part of the contract that they were to be delivered within any specified time. *Saunderson v. Jackson* (*b*) shews that a subsequent letter, referring to or recognizing the contract, may be connected with a bill of parcels already delivered, so as to make a sufficient note in writing to satisfy the statute; and the authority of that case was admitted in *Cooper v. Smith*: which was distinguished on the ground that the letter did not recognize but falsified the contract. *Schneider v. Norris* (*c*) shews, that a letter recognizing an invoice or bill of parcels is such evidence of the contract as to take a case out of the mischief which the statute was intended to prevent: and in *Allen v. Bennet* (*d*) it was held, that an order for goods, written and signed by the seller's agent in a book of the buyer's, but not naming the buyer, might be *connected* with a letter of the seller to his agent mentioning the name of the buyer, and with a letter of the buyer to the seller claiming the performance of the order, so as to constitute a complete contract within the statute of frauds.

Lord TENTERDEN C. J. I think this letter is not a sufficient note or memorandum in writing of the contract to satisfy the statute of frauds. Even connecting it with the invoice, it is imperfect. If we were to decide that this was a sufficient note in writing, we should in effect hold, that if a man were to write and say, "I have re-

(*a*) 15 *East*, 103.

(*b*) 2 *Bos & P.* 238.

(*c*) 2 *M. & S.* 286.

(*d*) 3 *Taunt.* 169.

ceived

ceived your invoice, but I insist upon it the hops have not been sent in time," that would be a note or memorandum in writing of the contract sufficient to satisfy the statute. I think the case of *Cooper v. Smith*, in substance, is not distinguishable from this case.

Rule refused. (a)

(a) See *Jackson v. Lowe*, 1 Bing. 9.

1827.

RICHARDS
against
POWELL.

POWNAL, Gent., one, &c. against FERRAND.

Saturday,
May 5th.

ASSUMPSIT for money paid, laid out, and expended to the use of the defendant. Plea, general issue. At the trial before Lord Tenterden C.J. at the Middlesex sittings after the last term, the following appeared to be the facts of the case:

The plaintiff was the indorser of a bill of exchange for 250*l.*, payable three months after date, drawn on the 11th March 1825, by one *Ford*, upon and accepted by *Ferrand*, the defendant. The bill was indorsed by *Ford* to the plaintiff, and by him to one *Hayes*, and again by him to one *Field*. The bill not having been paid when due, *Field*, the holder, brought actions against the several parties to the bill, and recovered judgment, and *Pownal*, the present plaintiff, on the 24th December 1825, in consequence of such recovery against him, paid *Field* 40*l.* on account of the bill. The defendant, *Ferrand*, having refused to pay the costs of the action against the other parties, *Field* recovered against him as acceptor 350*l.*, and 80*l.* costs, and levied upon his goods 340*l.*, giving credit for the 40*l.* paid him by *Pownal*. This action was brought to recover the 40*l.* which *Pownal*, the plaintiff, had been compelled to pay to *Field* on

The indorser of a bill, being sued by the holder, paid him part of the sum mentioned in the bill : Held, that he might recover the same from the acceptor in an action for money paid to his use.

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POWELL
against
EARL AND.

account of the bill. It was objected, that this money could not be recovered in this form of action, because there was no privity between the plaintiff and defendant; that the 40*l.* was not paid in exoneration of the defendant, but of the plaintiff, who was a party to, and liable on the bill; and it was said, that it would be a great hardship on the acceptor of a bill if several indorsers could, by partial payments, acquire a right of action. The Lord Chief Justice was of opinion, that as the defendant was liable by law to the amount of the bill, and as he had been exonerated from the payment of 40*l.* by the plaintiff's payment of that sum, it must be considered as so much money paid to his use. A verdict having been found for the plaintiff, judgment was given for the amount of the bill, less the amount paid to the plaintiff, and for costs.

Starkie now moved for a new trial. The plaintiff could not recover, except by reason of some legal interest in the bill, or of some contract collateral to the bill. First, that plaintiff, at the time when he made the payment, had no legal interest in the bill. By indorsing it, he had parted with his interest; and having paid only part, and not the whole, he acquired no new right to the bill. But even supposing him to have had an interest in the bill, and to have paid the whole amount, he would be remitted to his former right on the bill, and ought, in that case, to have declared on it. *Damnum Serruaderis* (a). The plaintiff was not entitled to recover by reason of any contract between him and the acceptor collateral to the bill. There was no privity between him and the acceptor, and unless there was some privity between the party paying the bill and the acceptor, the payment of the amount of the bill created no new con-

tract between the indorser and the acceptor. The indorser, by making such payment, was only remitted to his original right; and upon this ground the bankruptcy and certificate of the acceptor have been held to be a bar where the indorser has paid the amount after the bankruptcy of the acceptor; *Cowley v. Dunlop* (*a*), *Houle v. Baxter* (*b*). These cases clearly shew that the indorser of a bill does not, as such, stand in the situation of a surety for the acceptor, so as to make a payment to an indorsee a payment to the use of the acceptor. There is no liability on the part of the indorser, except that which arises from the law and custom of merchants. *Exall v. Partridge and two others* (*c*) may, at first sight, appear to be an authority against the present application. The goods of the plaintiff on premises let on lease to the three defendants were distrained by the landlord; the plaintiff paid the rent, and redeemed his goods: it was held, that this was money paid to the use of the original lessees, who were bound by their covenant to pay the rent. In that case *Partridge* and two others were co-lessees, and the two had assigned to *Partridge*: the plaintiff put his goods upon the premises under the care of *Partridge*, on whose part therefore there was clearly an implied assumpsit, that the goods should not be seized for rent due by his default. There was then a privity with one who was jointly with the two others bound to pay the rent, and the only question was, whether the right of action was against *Partridge* alone, or extended to all. The case depended upon privity of contract. There, if the plaintiff could not have recovered, he would have had no remedy whatever; but

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 POWELL
 against
 FERBAND.
(*a*) 7 T. R. 565.(*b*) 3 East, 177.(*c*) 8 T. R. 308.

here,

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against
FERRAND.

here, the party has a legitimate and proximate remedy; for there is a written instrument, the construction of which must regulate the rights and obligations of the parties. And the question is, whether the acceptor, by his general acceptance, undertakes not merely to pay the holder, but, in case of default, then to pay to every indorser who pays money on the bill.

LORD TENTERDEN C. J. The facts of this case are so very peculiar, that it appears to me that a decision in favour of the plaintiff will not tend to any mischievous consequences. The acceptor was primarily liable upon the bill to the plaintiff. *Field* sued the plaintiff on the bill, and obtained a verdict against him, and after that verdict the plaintiff paid *Field* 40*l.* on account of the bill. *Field* also brought an action against the defendant as acceptor of the bill, and obtained a verdict against him for 350*l.*, and judgment was signed for that sum and 30*l.* costs, and an execution issued against the defendant, under which 340*l.* was levied. This action is brought to recover from the defendant the sum of 40*l.*, which the plaintiff was compelled to pay as indorser of the bill. This case differs from *Cowley v. Dunlop* (*a*) and *Houle v. Baxter* (*b*); for in those cases the acceptors had become bankrupts, and obtained their certificates before the indorsers made any payment on account of the bills. At the time of making such payments, therefore, the acceptors had ceased to be liable on the bills. Here, the money paid by *Pownal* is money which the defendant *Ferrand* was liable to pay, and justice requires that *Pownal* should be allowed to recover it back.

(a) 7 T. R. 565.

(b) 3 East, 177.

It

It is said that *Pownal* ought to have sued on the bill; but the bill was not in his possession, and even if it was, there might be great difficulty in suing upon it, for the present defendant might have pleaded a former recovery of the whole amount of the bill. The plaintiff, by bringing this action for money paid to the use of the defendant, avoids this difficulty. I am of opinion that he is entitled to recover upon the general principle, that one man, who is compelled to pay money which another is bound by law to pay, is entitled to be reimbursed by the latter; and I think, that money paid under such circumstances may be considered as money paid to the use of the person who is so bound to pay it.

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POWNAL
against
FEARND.

BAYLEY J. It is the duty of the acceptor of a bill to pay it when due. If any injury result to him by reason of his non-payment of the bill, he has no ground of complaint, for it arises from his own breach of duty. If he pays the bill when it becomes due, no party can call upon him. The holder of a bill, however, has a right to claim payment from all the parties to it; but the acceptor is the only person who ought to expect to be called upon to pay it. Each party may pay something, and in that case the acceptor will be responsible to the several parties to the extent of the sums which they have paid. Here the holder called upon the plaintiff, one of the indorsers, to pay the bill. If the defendant had done his duty as acceptor, the plaintiff would not have been so called upon. The plaintiff did pay 40*l.* to the holder on account of the bill; and the question is, whether he is to lose that sum, or has any remedy against the defendant, in consequence of whose default he was compelled to pay it. The law is, that a party, by voluntarily paying the

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against
 FERKAND.

the debt of another, does not acquire any right of action against that other; but if I pay your debt because I am forced to do so, then I may recover the same; for the law raises a promise on the part of the person whose debt I pay to reimburse me. That principle was fully established in the case of *Exall v. Partridge* (*a*). There the goods of a stranger, which were on the premises of another, were distrained by the landlord for rent; and the stranger, in order to redeem them, was forced to pay the rent, and he brought an action to recover the same from the three joint lessées, from whom the rent was due to the landlord; and it was held, that as the money was paid by compulsion, in satisfaction of a demand upon the three, the action was maintainable. So in this case, the plaintiff paid, by compulsion, part of the debt due from the acceptor. It is said that the plaintiff has no remedy, because he has not paid the whole amount of the bill; but I think he is entitled to recover the part which he has paid, for to that extent the defendant has been benefited. The cases of *Coxley v. Dunlop* (*b*) and *Houle v. Baxter* (*c*) are distinguishable from the present, because in those cases the acceptors had become bankrupts and obtained their certificates, which operated as statutable releases of their debts before the money was paid.

HOLROYD J. I am of opinion that this action for money paid to the defendant's use is maintainable. The defendant, as acceptor of the bill, was liable in the first instance to pay it. If he had performed his duty, the plaintiff would not have been called upon by the holder; but, as indorser, he was liable to be called

(*a*) 8 T. R. 508.

(*b*) 7 T. R. 565.

(*c*) 3 East, 177.

upon

upon either to pay the whole or part; he was called upon, and was actually compelled to pay part. There was no breach of duty on his part; and I think that he having been compelled by law to pay money which the defendant was liable to pay, the law will imply a promise on the part of the latter to repay the money: for it is a general principle, that a man who pays the debt of another by compulsion, may recover from him the amount of the debt so paid. It is said that the plaintiff by making this payment was only remitted to his remedy upon the bill; but I am of opinion that the plaintiff is entitled to recover in this action upon the same principle upon which a surety is entitled to recover money from his principal. I think that a party is not bound to resort to the original engagement unless it be by deed, but that he may at his election found his action upon the original engagement, or bring *indebitatus assumpsit* for money paid.

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POWELL,
against
EXALL.

LITTLEDALE J. The authorities cited induced me for some time to entertain considerable doubt whether the plaintiff as indorser could recover in this form; but upon further consideration, I am of opinion that although the plaintiff by making the payment may be remitted to his original right upon the bill, yet he may also maintain an action for money paid to his use. It is a general rule, that a man who is compelled by process of law to pay money which another is liable to pay, may in an action of *indebitatus assumpsit*, for money paid to the use of that other, recover the same. This case in principle resembles *Exall v. Partridge* (a). There the

(a) 8 T. R. 308.

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lessees were liable by law to pay the rent. Here the acceptor was liable by law to pay the amount specified in the bill, and the indorser was liable only in default of payment by the acceptor. So in *Exall v. Partridge*, the stranger having his goods upon the premises in respect of which the rent was due, became, by reason of the default of the lessees, liable to satisfy the rent out of his goods. It was held in that case, that the law would imply a promise on the part of the lessees to repay the stranger the rent which he had been compelled to pay. It is true that in this case, the acceptor will become liable to several actions; but he has brought that upon himself by not paying the bill when it became due, as he ought to have done. The same inconvenience might happen in the case of a distress for rent; for if the goods of different persons were distrained upon, and they severally contributed sums towards payment of the rent, the lessees would be liable to several actions.

Rule refused.

Saturday,
May 5th.

MORRIS against MELLIN.

The fourth section of the statute 3 G. 4. c. 39. which requires the defeasance to a warrant of attorney to be written on the paper or parchment on which the instrument itself is written, applies only to such warrants of attorney, &c. as fall within the former sections of the act, viz. warrants of attorney, which, in the event of not being filed within twenty-one days after execution, are void against the assignees of a bankrupt, and consequently a warrant of attorney subject to a defeasance, not written on the same paper or parchment, is not void against the assignee of an insolvent debtor: Held, by Lord Tenterden C.J., Bayley and Littledale J.s. Holroyd J. dissentient.

A RULE nisi had been obtained for setting aside the judgment signed in this cause, and for cancelling the warrant of attorney on which the judgment had been entered up. The warrant of attorney was executed on the 12th of April 1824, and purported on

the

the face of it to be given for the purpose of securing payment from the defendant to the plaintiff of 780*l.*; but it now appeared by affidavit that it was executed upon the express condition that it was only to stand as a security for a sum to be awarded by an arbitrator named by the parties, that no award had been made, and that the defendant *Mellin*, in *March 1825*, had taken the benefit of the insolvent act, and one *James Currie* was appointed assignee of his estate and effects. The warrant of attorney was filed and judgment entered up within twenty-one days after execution. The present rule was obtained on the application of *Currie* the assignee, upon the ground, among others, that the warrant of attorney was void by the statute 3 G. 4. c. 39. s. 4., because the defeazance was not written on the same paper or parchment before the time when it was filed.

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*Motions
against
MELLIN.*

Bonpass now shewed cause. The statute 3 G. 4. c. 39. s. 4. enacts, not that every warrant of attorney given subject to a defeazance shall be void unless written on the same paper or parchment, but only such warrants of attorney as are mentioned in the preceding sections, and those are warrants of attorney which if not filed within twenty-one days, or whereupon judgment is not entered up within that time, are made void only against assignees of a bankrupt. Here the warrant of attorney was filed, and the judgment was entered up, within twenty-one days after the execution, and there has been no bankruptcy, and, therefore, this is not a warrant of attorney within the meaning of the fourth section.

Russell contra. The fourth section must be read as if the words were "every warrant of attorney;" for other-

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against
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otherwise this consequence will follow, that secret warrants of attorney will be void only against assignees of a bankrupt, and not against the assignees of an insolvent debtor; whereas it appears manifestly from the title and the preamble of the statute, that the object of the legislature was to protect the creditors of insolvents as well as of bankrupts.

Lord TENTERDEN C. J. The question in this case is simply this,—whether by the true construction of the fourth section of the statute 3 G. 4. c. 39. s. 4. the words “such warrant of attorney or cognovit actionem” are to be understood as comprehending *every* warrant of attorney, or such only as are described particularly in the former sections, and are there declared void in favour of the assignees of a bankrupt, unless they are filed within twenty-one days, or unless judgment be entered up on them within that time. It seems to me that the question can by no means depend on the filing of the warrant of attorney. The title of the act is, “An act for preventing frauds upon creditors upon secret warrants of attorney to confess judgment.” The preamble recites, that “injustice is frequently done to creditors by secret warrants of attorney to confess judgment.” The recital, as well as the title, shews therefore that the object of the act of parliament was to protect creditors; and one might have expected that the enactment would be co-extensive with the mischief recited, and would in express terms make secret warrants of attorney void against *all* creditors; but it is narrower than the preamble. The second section enacts, that “unless the warrant of attorney shall be filed or judgment entered up within twenty-one days after the exe-

cution of it, such warrant of attorney shall be fraudulent and void against the assignees of a bankrupt." If we were to give to the fourth section the effect we are called upon to do, it would apply to all warrants of attorney, and it would have the effect of protecting creditors, although no commission of bankrupt had issued against the debtor who gave the warrant of attorney; and it would render it void in favour of the party himself. It is a general rule, in the interpretation of acts of parliament, that an enactment, the effect of which is to cut down, abridge, or restrain any written instrument, shall have a limited construction. The first section of this statute enacts that the holder may, if he think fit, file the warrant of attorney and defeasance within twenty-one days. The second section then declaims what shall be the consequence if it be not filed within the time mentioned, viz. that it shall be null and void, *not generally*, but against the *assignees of a bankrupt*. The third section contains a similar enactment as to a cognovit actionem. Then comes the fourth section, which enacts, that "If such warrant of attorney or cognovit actionem shall be given subject to any defeasance or condition, such defeasance or condition shall be written on the same paper or parchment on which such warrant of attorney or cognovit actionem shall be written before the time when the same shall be filed, otherwise such warrant of attorney or cognovit actionem shall be void to all intents and purposes." Now if we were to hold every warrant of attorney not filed within the time mentioned in the second section to be void to all intents and purposes by reason of the defeasance not having been written on the same paper or parchment, we should make the act not merely afford

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protection to creditors under a commission of bankrupt, but to *all* creditors; and we should even enable a party who gave the warrant of attorney to treat it as a nullity on that ground. I think that the fourth section applies to such warrants of attorney only as would, by the former provisions of the act, be fraudulent and void against creditors under a commission of bankrupt, in consequence of their not having been filed within twenty-one days after the execution thereof, or judgment not having been entered up within that time: and that being so, I think this rule ought to be discharged.

BAYLEY J. This is a question of considerable difficulty; but I incline to think that all the clauses of the act are to be confined to the protection of creditors under a commission of bankrupt, and ought not to be extended to protect all creditors or parties to the instrument, so as to enable them to treat the instrument as a nullity. It is a general rule, that, in order to avoid any written instrument by positive enactment, the words of that enactment ought to be so clear and express as to leave no doubt of the intention of the legislature. If the construction contended for in this case were to prevail, one of the *parties* to the warrant of attorney might treat it as a nullity, on the ground that the defeasance was not written on the same paper or parchment as the warrant of attorney, but the title of the act shews that *creditors* were the persons intended to be protected. From the preamble it appears that the only mischief contemplated was the injustice done to *creditors*. Then the first section enacts, not that every warrant of attorney shall be filed, but that if the holder shall think fit, it shall be filed. Then section 2. declares

warrants

warrants of attorney not filed within the time therein mentioned, or on which judgment shall not be entered up within that time, to be void, not against *all* creditors, but against the assignees under a commission of bankrupt. Such an instrument, notwithstanding this enactment, therefore, would be valid against the assignees of an insolvent debtor. That section applies only to warrants of attorney. The third section contains the same provision as to a cognovit. But that is not a general provision that every cognovit actionem shall be void against *all* creditors, but only against the assignees of a bankrupt. These sections would not entitle a party to a warrant of attorney or a cognovit, to apply to the Court to vacate the instruments or judgments entered up on them. All the provisions of this act seem to contemplate a protection to creditors. The fourth section enacts, "that if *such* warrant of attorney shall be given, subject to a defeazance, such defeazance or condition shall be written on the same paper before the time when the warrant of attorney shall be filed, otherwise such warrant of attorney shall be null and void to all intents and purposes." The question in this case depends, as it seems to me, not only on the effect of the words, "*such warrant of attorney,*" but of the words, "*to all intents and purposes;*" whether the instrument is to be void to all intents and purposes, or void only to the intent and purpose of giving to *creditors* that protection contemplated by the other clauses of the act. Seeing that the provisions in the former sections have in view the protection of *creditors* only, and there being no recital in this section to shew a different intent, I incline to think that the warrants of attorney contemplated by the fourth section of the act, with respect to which the defeazance

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is required to be on the same paper or parchment as the warrant of attorney, are such only as are mentioned in the former section, viz. those which will be void against the assignees of a bankrupt, in case they are not filed in due time. At the time when the act passed there was a rule of this Court (*a*) which gave some protection to parties affected by warrants of attorney: that rule required every attorney who should prepare a warrant of attorney to confess judgment which was to be subject to any defeazance, to cause such defeazance to be written on the same paper or parchment on which the warrant of attorney was written, or to cause a memorandum in writing to be made on such warrant of attorney, containing the substance and effect of such defeazance. Upon the whole, looking to the title and preamble of the act, from which it appears that the legislature had in view the protection of creditors only, and looking to the second and third sections, which make the instruments therein mentioned void against the assignees of a bankrupt only, the inclination of my opinion is, that the fourth section makes null and void those instruments alone which would be void against the assignees of a bankrupt in case they were not filed in due time; and that being so, I think this rule ought to be discharged.

HOLROYD J. I own that the inclination of my opinion is, that the fourth section extends to all warrants of attorney. I think that the effect of giving it a narrower construction might be, to render successful those very frauds which it was the object of the legislature to prevent. I think, also, that the enactment ought not to be narrowed, either by reason of the matter contained in the title or the preamble. The preamble recites,

(*a*) *Michaelmas term, 42 G. 3. 1801.*

“ that

"that injustice is frequently done to creditors by secret warrants of attorney to confess judgment, whereby persons *in a state of insolvency* are enabled to keep up the appearance of being in good circumstances; and the persons holding such warrants of attorney have the power of taking the property of such *insolvents* at any time, to the exclusion of the rest of the creditors." In the preamble, therefore, the legislature contemplate the creditors of persons in a state of insolvency, and not merely the creditors of those who afterwards become bankrupt; and I think the words of the fourth section are large enough to comprehend all warrants of attorney which are within the mischief recited. If they be confined in construction to such only as would be void against the assignees of a bankrupt by the second section, the consequence will be, that the creditors of an insolvent debtor, whom it was equally the object of the legislature to protect, will be deprived of all benefit of the statute. It may be beneficial to the creditors of an insolvent, or even to the party giving or taking a warrant of attorney, that the defeazance should be written on the same paper or parchment as the warrant of attorney, in order that precise information of the nature of the instrument may be obtained at any subsequent time; the legislature may, therefore, have intended to require it in all cases. The words of the fourth section are, "that such warrant of attorney or cognovit actionem shall be void to all intents and purposes." But if the construction contended for prevail, it will be void only to the intent and purpose of protecting the creditors of a bankrupt. It will not be void, even in favour of the creditors of an insolvent debtor. But as it is clear that the legislature contemplated the injustice done to the creditors of persons in a state of insolvency, I incline to think that a

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warrant of attorney subject to a defeasance or condition not written on the same paper or parchment, is void against the assignee of an insolvent debtor, within the meaning of the fourth section of this statute.

Edward Holroyd, amicus curiae, suggested, that the statute 7 G. 4. c. 57. s. 93. was a legislative declaration; that the provisions of the statute 3 G. 4. c. 89. did not extend to the assignees of an insolvent debtor.

LITTLEDALE J. I am of opinion that this rule ought to be discharged. The question depends upon the words, "such warrant of attorney" in the fourth section. That may mean every warrant of attorney, or such only as are mentioned in the former sections. The title of the act, as well as the preamble, shews that the object of the legislature was to prevent frauds upon creditors. The second and third sections make warrants of attorney in certain cases void against the assignees of a bankrupt. The title, therefore, the preamble, and the provisions contained in the second and third sections, seem to be confined in their operation to the protection of creditors. Then the fourth section enacts, "that if such warrant of attorney or cognovit shall be given, subject to a defeasance, such defeasance shall be written on the same paper or parchment as the warrant of attorney or cognovit, before the time when the same or a copy thereof shall be filed, otherwise such warrant of attorney or cognovit shall be void to all intents and purposes." This section comes after the other enactments, and we must look to them to see what is the warrant of attorney or cognovit actionem to which the word *such* in this section applies. Now the instruments mentioned in those enactments were warrants of attorney limited

limited in their nature, and which were to be void against assignees of a bankrupt, in case they were not filed, or judgment entered up on them within twenty-one days. It is said that this section extends to all warrants of attorney, where other creditors than those of a bankrupt are interested, or even where creditors have no interest whatever. But there is no provision made as to the consequences of not filing a warrant of attorney, where the creditors of an insolvent debtor are concerned. It seems to me, that the true meaning of the fourth section is this, that those warrants of attorney which would be void within the former provisions of the act, by reason of their not having been filed within twenty-one days after execution, shall be null and void also within the fourth section, for want of having the defeazance written on the same paper or parchment as the warrant of attorney or cognovit actionem. The statute 7 G. 4. c. 57. s. 33. recites, that it was expedient to extend the provisions of the statute 3 G. 4. c. 39., and enacts, that the last-mentioned act shall extend to the assignee of every prisoner who shall, within the time therein mentioned, apply to the Insolvent Court for his discharge from confinement, as if the last-mentioned act had been expressly therein enacted; and it then declares, that all warrants of attorney, &c. &c. which by the last-mentioned act were declared to be fraudulent and void against the assignees of a bankrupt, shall be deemed fraudulent and void against the assignees of an insolvent debtor. This, as it seems to me, is a legislative declaration, that the statute 3 G. 4. c. 39. did not make such instrument void against the assignees of an insolvent debtor. Upon the whole, I think that this rule ought to be discharged.

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Rule discharged.

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Saturday,
May 5th.

MOORE and Others against HAMMOND.

By the deed of settlement of a joint stock company, it was provided that the directors of the company should, without notice or summons, meet together at their office once in every week, on and at such day and hour as they should from time to time agree upon, and also at such other times as they should from time to time be convened in manner hereinafter mentioned, or adjourned to, and that three directors should be a board. By another clause, any three directors were empowered at any time to call a special board or meeting, by giving, under their hands in writing, three days' notice to the other directors of the company, which notices were to be countersigned by the secretary, and to be sent by him two days prior to the time appointed for such meeting: Held, that in order to constitute a good weekly meeting without notice or summons, the day and hour of meeting must have been previously agreed upon by the directors, and therefore, that a meeting of three directors, without previous agreement on their part to meet on any fixed day or hour, was not a meeting duly convened within the meaning of the deed of settlement.

DECLARATION stated, that by an indenture made between the several persons whose names were thereunto subscribed, and whose seals were thereto affixed, except the said plaintiffs, of the one part; and said plaintiffs of the other part, after reciting as therein mentioned, it was witnessed, that for certain purposes in the indenture mentioned, each of the several parties to the indenture, except the said plaintiffs, did thereby for himself or herself, and his or her heirs, executors, administrators, and assigns, covenant with the said plaintiffs, their executors, &c., amongst other things, that the said several persons, parties to the indenture, all of whom were thereafter distinguished by the title of Proprietors, and the several other persons who should become proprietors as hereinafter was mentioned, should, while holding shares in the capital of a certain company thereinbefore proposed to be established, and until they should cease to be such proprietors in the manner hereinafter mentioned, be and continue for the term of fifty years from the date thereof, or until the same should be dissolved, under the provisions hereinafter in that behalf contained, a company or partnership, society or association, by and under the name and firm of the Cornwall and Devonshire Mining Company, and that

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the affairs and concerns of the said company or partnership society should be conducted and managed under and subject to the several rules, regulations, and conditions, restrictions, clauses, and agreements thereafter contained, and amongst others the following: that is to say, that for the orderly and more effectual management of the affairs of the partnership society, there should, during the continuance of it, be kept up a certain number of directors, and that the directors should meet together at all times, and according to the regulations and conditions in the indenture in that behalf mentioned; and that any such meeting of directors, which should consist of three or more directors for the time being, should be and be styled a board of Directors, at their full discretion from time to time to come to a resolution that the proprietors should be called upon to pay, at any time, within one calendar month from the time of such resolution, any further instalment on each of their shares, till the whole sum payable on each should have been paid; and that when the board of directors should have come to a resolution to call for any further settlement, they should call on all the proprietors to contribute the same rateably, in proportion to the number and amount in value of their several and respective shares, and that a circular letter should be delivered or sent by the post to each proprietor, informing him or her of the resolution, and of the day and place fixed by the board for the payment of such further instalment; and that every proprietor should pay such instalment at the day and place so fixed in that behalf as aforesaid. Averment, that the defendant became and still was a proprietor of divers, to wit, twenty shares of 50*l.* each, in the capital of the said company or partnership society,

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and duly executed the indenture as such proprietor; that after the making of the indenture, to wit, on the 14th *September* 1826, at, &c., at a meeting of the board of directors of the company, duly convened and held, according to the regulations and conditions in the indenture in that behalf contained, the sum of 35*l.* then remaining due and payable on each of the said shares, it was resolved, that the proprietors should thereby be called upon to pay, on or before the 13th of *October* then next, a further instalment of 5*l.* on each of their shares, and that a board of directors should be held on the last-mentioned day, at eleven o'clock in the forenoon precisely, at the offices of the company, No. 26. *Lombard Street*, for the purpose of receiving such further instalment; that on the 14th *September* 1826 a circular letter was sent by the post to the defendant, informing him of the resolution, and of the day and place fixed by the said board for the payment of such further instalment, whereby and by force of the indenture the defendant became liable to pay the sum of 100*l.*, being the amount of the said instalment of 5*l.* on each of his twenty shares, at the time and place in that behalf mentioned as aforesaid, of which the defendant had notice. Breach, non-payment of the said sum of 100*l.* The defendant pleaded, first, *non est factum*, and, secondly, that there was no such meeting of a board of directors of the said company or partnership society, duly convened and held according to the regulations and conditions in the supposed indenture in that behalf contained. At the trial before Lord *Tenterden C. J.*, at the *Middlesex* sittings after last term, it appeared that the plaintiffs were the trustees of a joint stock company, called the *Cornwall* and *Devonshire Mining Company*, and that the defendant

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ant was a partner or shareholder in that company. By the deed of settlement it was provided, that the directors of the company should, without notice or summons, meet together at the house or office of the company, once in every week at the least, *on and at such day and hour as they should from time to time agree upon*, and also at such other times as they should from time to time be convened in manner thereinafter mentioned or assented to. By another clause it was provided, that any three directors of the company might at any time call a special board or meeting of the directors thereof, by leaving, three days prior to the time appointed for such special board or meeting, with the secretary for the time being of the said company, notices in writing for the several other directors of the said company, which notice should be made under the respective hands of such directors convening such board or meeting, should be countersigned by the secretary for the time being of the company, and should be sent by him, by post or otherwise, two days prior to the time appointed for such special board or meeting, which last-mentioned respective periods of three days and two days should be calculated exclusive of the days of giving or sending such notices, and exclusive of the day of holding such special committee. By another clause it was provided, that every such meeting of directors of the company, whether weekly or otherwise, which should consist of three or more directors for the time being of the company, should be and be styled a Board of Directors; and that no business should be transacted at any weekly or other meeting of directors of the company, unless three directors thereof at the least were present at the commencement of the business; and when a decision or determination

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determination should take place upon the whole or such part of the business as should be then under consideration, then the clause authorized the board of directors, at their discretion, from time to time to come to a resolution that the proprietors should be called upon to pay, at any time within one calendar month from the time of such resolution, any further instalment on each of their shares, till the whole sum payable on each such share should have been paid. It was proved that on *Thursday* the 14th of *September* 1826, a meeting was held at which the secretary and three directors were present (the chairman of the company being one). The day of meeting had not been previously fixed or agreed upon by the directors, nor was it held in pursuance of an adjournment from a former meeting, for there had been no meeting of the directors since the 8th of *August* preceding. The rough draft of the proceedings made by the secretary, as well as the copy of the proceedings transcribed into the books of the company, where the minutes of the proceedings of the board of directors usually were entered, and which were signed by the chairman, were produced; and it appeared that a resolution was then come to that a call should be made of *5l.* on each share, to be paid on the 13th of *October*. Upon this evidence the defendant's counsel contended that the meeting was not duly convened. It clearly was not a good special board or meeting of the directors, for that could only be called by three directors of the company, giving three days' notice, &c. Secondly, although the directors might, without notice or summons, meet weekly, yet such a meeting could only be held either by adjournment or at such day and hour as they the directors should from time

time to time agree upon. Now this was not a meeting held in pursuance of any resolution of an adjournment come to at a former meeting, nor had the directors previously agreed upon any day or hour at which they should meet. To this it was answered, by the plaintiff's counsel, that it must be taken that the meeting was duly convened, the minutes of the meeting having been regularly entered by the secretary in the books belonging to the board of directors, and signed by the chairman; and that it was not competent therefore to the defendant to shew that no prior meeting had been held at which a resolution of an adjournment had taken place; and, secondly, assuming that there had been no adjournment, it was contended that this was a regular meeting held by three directors without notice or summons, for the three directors did meet on the 14th *September*, and passed the resolution which was regularly entered; they thereby shewed that they agreed to meet at the day and time when they passed the resolution. It was true that there was no evidence of any prior agreement on the part of the directors that there should be a meeting on any fixed day, but that was unnecessary. In order to convene a special board, great form and precision were required. The notices must be signed by three directors, and left three days with the secretary, and five days must intervene before the meeting can be held. Before any such meeting can be convened, it may in the mean time be essential that a board may be held, for no act can be done but by a board of directors. The mines may have been flooded, or some other accident may have occurred which may have rendered it necessary that some act should immediately be done by the company, and unless the directors had a power of meeting

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in this manner without a summons from the secretary, the company might have been destroyed.

Lord TENTERDEN C.J. It is of great importance to a partnership consisting, as this does, of a large number of persons, who place the management and control of their affairs in a small number, and by the deed by which they so place their affairs under the management of that small number, provide certain regulations for the conduct of that small number, by whatever name they may be designated, that the regulations regarding the meetings of those intrusted with the management of their affairs should be held in pursuance of the directions of the deed. The deed in question provides for two classes of meetings of the directors; the one to be held without summons or notice, the other to be held upon summons. The class that may be held without summons or notice are weekly meetings; and they are to be held at such day and hour as the directors shall from time to time agree upon. Supposing, therefore, the directors at any meeting to have come to a resolution that there should be a meeting held on any one specified day in the week, a meeting on that day without notice or summons would be a good meeting within the provisions of this deed; but unless the directors have previously agreed upon the day on which the meeting shall be held, it appears to me that a meeting on any other day is not a good weekly meeting within the meaning of this clause. If it were held to be so, it would be in the power of any three of the directors, the chairman or deputy chairman being one, to hold a meeting to make an order for payment on shares, or to do any other act whatsoever regarding the affairs of the company, without any notice to the proprietors.

prietors. I cannot think that such was the meaning of this clause; but that a meeting cannot be legally held unless by notice, or unless the directors have previously agreed to meet at a certain time and place, in order that every director may know the day on which such business will be transacted, and that he may have an opportunity of attending. I am therefore of opinion, that this objection must prevail. It is said that a great length of time must elapse if a fresh summons according to the deed were required. But five or six days certainly would be sufficient. Upon the whole, I think the meeting was not duly convened.

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The plaintiff was nonsuited.

Campbell now moved to set aside the nonsuit, upon the grounds urged at the trial. But the whole Court were of opinion that the meeting was not duly held, in consequence of there not having been any prior agreement of the directors to meet on the 14th of September.

Rule refused.

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*Monday,
May 7th.*HUTCHINGS *against* MORRIS and Others.

In an action against excise officers for the detention and negligent custody of certain malt, &c. taken under a distress upon a conviction under the malt act, statute 43 G. 5. c. 74., it appeared that the plaintiff having been convicted in a penalty, a warrant issued, directing the defendants to levy the same, and that they seized and removed the plaintiff's goods from his premises; and that afterwards he paid the penalty. The defendants, ten days after this payment, brought the goods back to the plaintiff's premises, but in a damaged state: Held, that in order to make the detention unlawful, the plaintiff ought to have demanded the goods, and that there having been no demand, the detention was not unlawful.

THIS was an action on the case against excise officers for the detention and negligent custody of certain quantities of wheat, malt, and utensils taken under a distress upon a conviction under the statute 43 G. 5. c. 74. s. 13. (malt act.) The first count of the declaration stated, that the defendants having taken the goods in question as and for a distress for a certain penalty, whilst they were in their possession, and within six days after such seizure, the plaintiffs paid to the defendants a certain sum in satisfaction and discharge of the said penalty, *and then and there requested* the defendants to re-deliver and restore the goods; that the defendants accepted and received the said sum in discharge of such penalty, and ought then and there to have re-delivered and restored the goods upon such request; that the defendants wholly neglected and refused so to do, but wrongfully kept and detained them for a long space of time, to wit, twenty days, and during all that time so negligently kept the same, that by and through the mere negligence, &c. divers quantities of the said wheat, &c. became wetted, damaged, and deteriorated, &c. The second count stated the seizing as before for a distress for a penalty, the payment of the money in satisfaction and discharge of such penalty, an allegation that the same sum was sufficient to satisfy such penalty, and the acceptance and receipt by the defendants in discharge, &c., *that thercupon it became the duty of the defendants to restore, &c.*; that the defendants did not nor would

would re-deliver or restore the same, but on the contrary, wrongfully, &c. kept and detained, &c. and so negligently, that, &c. (stating similar special damage as in the first count.) Third count stated the seizing, &c. as before, the payment and receipt of a sum in discharge of the penalty, and averred that thereupon it became and was the duty of the defendants *within a reasonable time* to have restored and re-delivered the goods, and to have kept the same in a dry and clean state. Breach, that the defendants did not re-deliver, nor in the mean time keep in a dry and clean state, but on the contrary, &c. alleging special damage as before. There was a fourth count in trover. At the trial before Burrough J. at the Somerset Lent assizes, it appeared that the plaintiff being a maltster, and having been convicted under the malt acts in a penalty of 200*l.* (mitigated by the justices to 30*l.*), and a warrant issued directing the officers to levy the same and to return the surplus to the plaintiff, the defendants seized and immediately removed the goods off the premises; the plaintiff immediately afterwards paid the amount stated in the warrant, but there was no evidence of his having requested the defendants to return the goods. After the lapse of ten days, they brought them back of their own accord in a cart exposed to the rain, but in a wet and greatly damaged state, and some portion of the wheat entirely lost. Upon this evidence, the learned Judge was of opinion, first, that in the absence of any request to re-deliver the goods, the officers were not bound to do so; that the detention therefore by them was not wrongful, and that the plaintiff must bear the consequences of any injury which had happened to them; that in respect of any injury by the negligent

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mode of bringing back the goods, there was no allegation in either of the counts of that particular misfeazance, and he nonsuited the plaintiff.

Erskine now moved to set aside the nonsuit, on the ground, that although the officers might not be bound to re-deliver the goods, yet that having in fact done so, they were obliged to use proper care, and that the allegation in the third count was divisible, and it was sufficient to support the action if the plaintiff proved either of the acts of misfeazance alleged.

Lord TENTERDEN C. J. There was no wrongful detention, because there was no demand; the defendants by re-delivering the goods did more than they were bound by law to do; for a demand of the goods was necessary in order to make their detention by them unlawful.

HOLROYD J. The plaintiff does not complain of any damage having accrued before the penalty was paid. The defendants were not bound by law to take any care of the goods after the penalty had been paid. As soon as the penalty was paid, the plaintiff ought to have demanded the goods, and if the defendants had refused to deliver them, they would in that case have been responsible.

Rule refused.

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BRANDLING *against* BARRINGTON.*Friday,
May 11th.*

THIS was an action on the case brought against the defendant as sheriff of the county palatine of *Durham*, for removing the goods of a tenant from certain premises rented by him of the plaintiff, without having paid the plaintiff one half year's rent then due for the same premises, against the form of the statute 8 *Anne*, c. 14. The defendant pleaded the general issue, and on the trial at the assizes for *Durham*, in the summer 1824, before *Hullock* B., a verdict was taken for the plaintiff, damages 125*l.*, subject to the opinion of this Court on the following case: *John Hudson* was tenant to the plaintiff of certain lands and premises in the parish of *Chester-le-street*, in the county of *Durham*, from the 12th of *May* 1822 to the 12th of *May* 1823, and on the 22d day of *November* 1822, the sum of 125*l.* was due from him to the plaintiff for one half year's rent of the same premises, and continued to be due until and at the time of the defendant's entry as hereinafter mentioned. On the 17th of *January* 1823, the defendant, as sheriff of the county, entered upon the premises and seized certain goods of *Hudson*'s their being upon the premises, and to a greater amount than the rent due, by virtue of a writ of *pone per vadious*, tested the 10th day of *January*, and issued on the 15th out of the Court of Chancery of the said county palatine, at the suit of one *William Thompson*, and returnable in the court of pleas at *Durham* on the 25th of the same month. *Hudson* did not appear at the return of the writ, and thereupon on the same day was issued out of the said court of pleas a process called an

Where certain goods upon a farm were seized by virtue of a writ of *pone per vadious* against the occupier, issued out of the court of pleas at *Durham*, and were afterwards, upon his default, forfeited to the bishop, who, by writ to the sheriff, ordered them to be assigned to the party at whose suit the *pone* issued, in satisfaction of his damages: Held, that the sheriff was not bound to pay the landlord half a year's rent then due, before he removed the goods.

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extract, directed to the defendant as sheriff, on receipt of which he made his warrant to the bailiff, who had seized and had continued in possession of *Hudson's* goods, under the writ of pone per vadious, requesting him thereby to deliver over to the plaintiff in the action the goods which had been attached, in satisfaction of his damages. The bailiff, on the receipt of the warrant, proceeded to a sale of the goods by auction on the 12th of *February*, he being an auctioneer, and acting as such at the sale. On the 26th of *January* the sheriff had notice that the sum of 125*l.* was due from *Hudson* to the plaintiff, for rent of the said premises; but the bailiff, without paying over to the plaintiff any part of such rent, delivered the goods to the purchasers at the sale, who removed them off the premises, the rent being then and still unsatisfied. The bailiff paid over the proceeds of the sale to the attorney of *Thompson*, the plaintiff in the cause, and received from him thereout the amount of his charge for keeping possession from the attachment of the goods, under the writ of pone per vadious, up to and with the day of sale, and the expences of the sale. The bailiff returned the auction-sheet to the defendant, who certified thereon, that the goods had been attached by virtue of a writ of pone per vadious, and afterwards sold by virtue of a writ of extract in satisfaction of *Thompson's* damages and costs; and upon this certificate the auction-duty was remitted under the 19 G. 3. c. 56. s. 15.

The practice of the courts of the county palatine of *Durham*, as respects this question, is as follows:— When the plaintiff sues the writ of pone per vadious out of the court of Chancery, he makes an affidavit of the amount of the debt due to him, which is filed in that court, and which amount being indorsed on the writ, is a guide to the officer who executes the writ,

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as to the value of the goods by which he attaches the debtor. If the writ is executed more than four days before the return, the debtor has till twelve o'clock of the morrow of the return-day to appear; if within four days of the return, he has, by a modern rule of court, four days after the return to appear, and on appearance he may cast an *essoign* to the next court-day. If he does not appear at the regular time, a minute of his default is marked upon the writ by the prothonotary of the Court of Pleas. The plaint of the writ is afterwards entered in a book, called the Remembrancer's Book, and immediately after the entry in the book, the word *default* is added, and at the instance of the plaintiff, an extract is issued, directed to the sheriff, and the sheriff makes his warrant to the bailiff, in the forms respectively used in this case. No judgment is signed, nor other proceedings taken in court, save as above stated. On the receipt of the warrant, the bailiff to whom it is directed, and who is always the same officer who has made the attachment under the writ of *pone per vadis*, proceeds to sell the goods. If he himself is an auctioneer, he acts as such at the sale, if not, the auctioneer is engaged by him or by the plaintiff's attorney; and the expences of the sale, together with those of keeping possession of the goods under the writ of *pone*, up to and with the day of sale, are in all cases paid by the plaintiff's attorney, or otherwise delivered to the bailiff from the proceeds of the sale. The plaintiff is then satisfied his demand, according to the amount sworn to by him in his affidavit of debt, and the surplus, if any, is refunded to the debtor. In case the debtor's goods have been attached at the several suits of two creditors, and extracts have issued in each suit, the demands of the several creditors are satisfied in the order in which

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the respective writs of pone per vadious have been executed by the seizure and attachment of the defendant's goods under them respectively. The sheriff does not receive any poundage on these sales, but in the present case and in every case since the passing of the 19 G. 3. c. 56. the sheriff has made a certificate to the excise under the fifteenth section. These proceedings are final; and after his default has been recorded by the prothonotary, as stated above, the defendant is not permitted to come in subsequently and contest the debt upon any terms whatsoever.

The following are copies of the writ of pone per vadious and extract: "George the Fourth, by the grace of God, &c. To the sheriff of Durham, greeting: If William Thompson make you secure of prosecuting his claim, then put by gages and safe pledges John Hudson, late of the city of Durham, in your county, yeoman, that he be before our justices at Durham, on the 25th day of January instant, to shew for that," &c. Here followed counts in assumpsit for goods sold, and the money counts concluding to the plaintiff's damage of 500*l.* The sheriff returned, that he had attached him by certain goods mentioned in a schedule annexed. The writ of extract was as follows: "An extract of the fines, amerciaments, and forfeitures lost, charged, and coming forth at the sessions or court of pleas held at Durham the 25th day of January, in the third year of the reign of our sovereign Lord George the Fourth, before James Baker, Master of Arts, Spiritual Chancellor of the diocese of Durham, Alexander Logan, Esquire, and others, their fellow-justices of our sovereign Lord the King, in the county palatine of Durham and Sadberge.

The Honourable William Kepple Barrington, sheriff of Durham, 195*l.* upon him charged for the value of divers goods

goods and chattels specified in a certain schedule hereunto annexed, late of *John Hudson*, late of the city of *Durham*, in his county, yeoman, which were attached by the said sheriff, and forfeited to the Bishop of Durham that same session or court of pleas, because the said *John* did not appear on that day to answer *William Thompson* of a plea of trespass on the case to the damage of the said *William* of 500*l.* as he was attached by the said plaintiff.

" Mr. Sheriff,

" The goods and chattels above-named were forfeited to the Lord Bishop of *Durham*: his Lordship is pleased that they be assigned over to the said plaintiff in satisfaction of so much of his damages above specified as the value thereof doth amount unto, which is to be allowed you in your account by the said Bishop, and which his Lordship hath empowered us to signify unto you."

" *J. G.* } Commissioners."
" *H. D.* }

Ingham for the plaintiff. The claim of the plaintiff in this case depends upon the statute 8 *Ann. c. 14. s. 1. (a)*,

(a) By which it was enacted, " That no goods or chattels whatsoever, lying or being in or upon any messuage, lands, or tenements, which are or shall be leased for life or lives, term of years, at will, or otherwise shall be liable to be taken by virtue of any execution on any pretence whatsoever, unless the party at whose suit the said execution is sued out shall, before the removal of such goods from off the premises by virtue of such execution or extent, pay to the landlord of the said premises, or his bailiff, all such sum or sums of money as are or shall be due for rent for the said premises at the time of the taking such goods and chattels by virtue of such execution; provided the said arrears of rent do not amount to more than one year's rent; and in case the said arrears shall exceed one year's rent, then the party at whose suit such execution is sued out, paying the landlord or his bailiff one year's rent, may proceed to execute his judgment, as he might have done before the making of this act; and the sheriff or other officer is hereby empowered and required to levy and pay to the plaintiff, as well the money so paid for rent as the execution money."

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which is a remedial statute; and if this case be within the mischief intended to be remedied, it ought to be held within the remedy, even if not within the words, *Com. Dig. Parl. (R. 15.)* The statute was made "for the better security of rents, and to prevent fraudulent removals by tenants;" and s. 1. appears to have been intended to operate as a protection for the landlord, wherever by process of law he is deprived of his remedy by distress. This is a fair provision for the landlord, upon whose land the stock has been fed and the crops produced, and is also beneficial to the tenant, as it enables the landlord to show him indulgence without risk of loss. In *Henchett v. Kimpson (a)* it was contended that the statute applies only to executions by a plaintiff, and certainly the words warrant that argument; but the Court said it should be liberally construed, and they held it to extend to a judgment and execution by the defendant. Upon the same principle it was held in *Dixon v. Smith (b)*, that where a sequestration issued out of the Court of Chancery, which is process to bring the party into court, the landlord was entitled to a year's rent, the sequestration being an execution within the equity of the statute. Again in *Greaves v. D'Acstro (c)*, where goods were seized under a writ of attachment, the Court of Exchequer ordered that a year's rent should be paid to the landlord out of the monies in the hands of the sheriff; and in *St. John's Coll. v. Murcott (d)*, Lawrence J. cited and approved of that decision. Perhaps it will be said that in the present case there was no judgment, and that the statute 8 Ann. c. 14. applies only to executions upon judgments. But in

(a) 2 Wils. 140.

(b) 1 Swanst. 457.

(c) Bunn. 194.

(d) 7 T. R. 264.

Gilb.

Gib. on Distresses, 16. (a), it is said respecting process of attachment, "Where this process issues out of a court of record there is no doubt, but if the defendant makes default, the goods he was attached by are forfeited, because in such case *there is a judgment* of the king's court of record condemning the goods, which alters the property." So in this case if the record were regularly made up, the judgment of forfeiture would appear as in *Harswicke v. Porter* (b), "therefore the said horse is forfeited to the Lord the King." If it be argued that the *capias utlagatum* was necessary to execute the judgment of outlawry, and that, therefore, the case of outlawry differs from the present, it may be answered, that although the goods were forfeited to the bishop without the extract, yet that process was necessary to perfect the title of the party, and the statute speaks of executions *at the suit of the party*. These cases establish that the statute should be liberally construed, so as to extend its benefits to all cases within the mischief. Now the mischief to be remedied was the loss sustained by landlords when they were deprived of the opportunity of distraining for rent: that loss was felt in all cases where the goods were taken into the custody of the law. In *Gib. on Distresses*, 50., it is laid down, "Goods in the custody of the law are not distrainable, for it is ex vi termini repugnant that it should be lawful to take goods out of the custody of the law; and that cannot be a pledge to me which I cannot bring into my actual possession." In all such cases it appears to have been the object of the legislature that the goods should not be applied to the satisfaction of a private creditor, until the

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(a) 4th edit.

(b) Cited in *Lawrence v. Netherell, Dyer*, 199.

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landlord had been paid a year's rent. This is a much stronger case than that of outlawry; for there the judgment may be reversed, the tenant may be repossessed of his property, and the landlord restored to his right of distress, but here it is stated in the case that the proceedings are absolutely final.

F. Pollock contrà. It is not necessary to decide this case in favour of the plaintiff, in order to give effect to the words of the statute, or the supposed intention of the legislature. The declaration charges the defendant with wrongfully removing goods from certain premises without having paid the landlord one half year's rent then due for those premises. Now it appears that when the defendant in the action made default the goods were forfeited to the Bishop, and he being pleased that an assignment should be made to the plaintiff, an order to that effect was made, and the sheriff in obedience to that order sold the goods, and delivered over the proceeds. It is impossible to say that he was a wrong-doer in obeying that process, nor is there any case to support such an opinion. In the case of *Dixon v. Smith* an application was made to the equitable jurisdiction of the Court into which the sequestrators had paid the money levied; it was not against the sequestrators themselves. So in *Greaves v. D'Astro* the application was to the equity of the Court of Exchequer. The statute 8 Ann. c. 14. was never intended to apply to such a case as the present: the word *execution* in that enactment means execution on a judgment, according to the opinion of Lord *Ellenborough* in *Lee v. Lopes (a)*. There the assignees of a bankrupt

(a) 15 East, 230.

were

were seeking to set aside an execution, and to compel the sheriff to pay them the amount of the levy : his answer was, that he had paid over part to the landlord, but the Court held that he was not thereby protected.

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Ingham in reply. The ground of the decision in *Lee v. Lopes* was that the sheriff had taken in execution goods which belonged to the assignees, and the landlord had a right to distrain for the rent-arrear, notwithstanding the bankruptcy. Not being deprived of his remedy by distress, he could have no claim to the benefit of the statute 8 *Ann. c. 14.*

LORD TENTERDEN C. J. I am of opinion, that the plaintiff in this case is not entitled to recover. It is an action charging the defendant, as sheriff of the county palatine of *Durham*, with having removed the goods of a tenant from the premises in his occupation without having paid to the landlord one half year's rent then due, contrary to the form of the statute 8 *Ann. c. 14.* Now the statute speaks only of goods taken by virtue of any *execution*, and the plain sense of the words is confined to executions on judgments. The process under which the sheriff seized and sold the goods in question was not process of execution on a judgment, it was not therefore within the words of the statute. But it is said, that it was within the equity. Speaking for myself alone, I cannot forbear observing, that I think there is always danger in giving effect to what is called the equity of a statute, and that it is much safer and better to rely on and abide by the plain words, although the legislature might possibly have provided for other cases had their attention been directed to them. Then a case was cited

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from *Bawdy's Report* as to the allowance of rent in the case of outlawry on civil process : that, however, was not a proceeding by action against the sheriff, but by application to the favour of the Court of Exchequer ; and in earlier cases, where the outlawry was at the suit of the crown, a similar application was dismissed. Another case, that of *Dixon v. Smith*, was cited from 1 *Somersett*, but that also was an application to the court into which the proceeds of a sequestration had been paid, and no complaint was made against the sequestrators. In the case of *St. John's College v. Marcott* an outlawry had taken place, and then a distress for rent was made, and the outlawry was afterwards reversed ; then the case was the same as if the outlawry had never been pronounced, and the distress was available. None of these cases govern the present. It appears to me that the plaintiff has mistaken his course, and that, instead of suing the sheriff, he should have applied by way of petition to the bishop's court. What would have been the effect of such a petition it is impossible to say ; but upon the authority of the cases which have been referred to, it probably would not have been dismissed without much consideration. If upon the process of pone the party appears, the goods by which he has been attached are released, otherwise they are forfeited to the bishop jure regali, and are at his disposal. An application to him under such circumstances would be very like the application to the Court of Exchequer in the case of outlawry on civil process, and it would be in his power to grant relief to the landlord. But I think that the landlord cannot treat the sheriff as a wrong-doer, and therefore our judgment must, in this case, be for the defendant.

BAYLEY

BAYLEY J. I certainly think that the present case comes within the mischief intended to be remedied by the statute 8 Ann. c. 14. s. 1., and I should have been better satisfied if it could have been brought within the fair construction of the words of that enactment. The object of the legislature, no doubt, was to secure to the landlord the payment of one year's rent in preference to any other creditor, and that was equally beneficial to the tenant, for whom it procured the indulgence of his landlord, whereas, but for the statute, he would expect to be distrained upon as soon as his rent became in arrear. But I think we should be attributing too comprehensive a meaning to the words of this statute, if we held that it entitled the present plaintiff to payment of the rent due to him. The goods of the tenant were not taken in execution, although that which has been done may have had the effect of an execution. The writ of pone is similar to the distresses issued out of this court for the purpose of compelling an appearance. Under the latter the sheriff may, by order of the court, sell the goods seized, and deliver over the proceeds to the plaintiff without paying to the landlord a year's rent. The writ of pone issues to compel an appearance: if the party attached does appear, his goods are restored; but if he makes default, they are forfeited to the bishop, who may dispose of them as he thinks fit. The order to deliver them to the plaintiff is made by him *ex gratia*, and the sheriff, acting under that order, is clearly protected. The observations made by my Lord *Tenterden* shew that the cases of outlawry are not authorities in favour of the plaintiff's right of action. For these reasons I concur in thinking that a nonsuit must be entered.

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HOLROYD J. I entirely agree with the view which has been taken of this question. This case does not appear to have been contemplated by the legislature, although it may perhaps be within the mischief which they intended to remedy by the 8 Ann. c. 14. The giving of the goods to the plaintiff was a mere voluntary act of the bishop, to whom they had been forfeited, and who had power to dispose of them as he thought fit. The proper course for the present plaintiff was to apply to the bishop by way of petition; then he might have obtained relief, but he has no right to recover against the sheriff.

LITTLEDALE J. It appears to me that this case does not come within the statute. The writ of pone is not an execution, although it may in some cases have the effect of an execution. Besides, it is clear that in this case the directions of the statute could not be complied with. It provides, that the party at whose suit the execution issues shall pay to the landlord the rent in arrear, provided that does not exceed one year's rent; and that he may then proceed to execute his judgment as he might have done before the passing of the act; and he is authorised to levy the money paid over for rent as well as the execution money. Here the authority of the sheriff as to seizure was at an end as soon as the party's goods were seized under the pone; and when he was afterwards ordered by the bishop to sell those goods and pay over the proceeds to the plaintiff, the statute did not give him authority to levy in addition any sum that was due for rent.

Postea to the defendant.

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WYMER against KEMBLE and MASTERMAN.

Tuesday,
May 15th.

TROVER for bank notes, money, household furniture, and stock in trade. Plea, the general issue. At the trial before Lord Tenterden C. J. at the Westminster sittings after Trinity term 1826, a verdict was found for the plaintiff, subject to the opinion of the Court upon the following case: *John Mileham*, a grocer, being indebted to the plaintiff in the sum of 629*l.* 18*s.* for money lent, secured to the plaintiff by a warrant of attorney bearing date the 24th day of February, in the year of our Lord 1819, the plaintiff on the 10th day of November 1825, entered up judgment by non sum informatus thereon, and a writ of fieri facias at the suit of the plaintiff, indorsed to levy 627*l.* 18*s.*, was issued on the same day upon such judgment, by virtue of which writ the sheriff of Middlesex on the same day, the 10th day of November 1825, levied upon the stock in trade, goods, and chattels of *John Mileham* within his bailiwick; and having caused them to be duly appraised, by bill of sale duly executed, bearing date the 5th day of December, in the year of our Lord 1825, in consideration of 402*l.* 17*s.*, bargained and sold the said goods and chattels taken in execution at the suit of the said plaintiff, to have and to hold the same to the said plaintiff as his own goods and chattels to his own use for ever; and on the same day formally delivered possession to the plaintiff of the said goods and chattels; from which time subsequently the plaintiff carried on the business of grocer on the same premises in his own name. On the 29d of December 1825, *John Mileham* declared himself insolvent, and on the 30th of December

Where *A.*, having a debt from *B.* secured to him by warrant of attorney, entered up judgment by non sum in formatus, issued a f. f. a., and took from the sheriff a bill of sale of the goods seized, and *B.*, having soon afterwards become bankrupt, his assignees took possession of and sold the goods so transferred to *A.*, who brought an action of trover for them: Held, that he was not a creditor, having security for his debt, within the 6 G. 4. c. 16. s. 108., and that he was entitled to recover.

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ember a commission of bankrupt against him was sealed, and on the following day, the 31st day of *December*, the messenger under such commission seized possession of all the money, goods, and chattels upon the premises comprised in the said bill of sale; which messenger, under such commission of bankrupt, continued in possession until the 3d day of *March* 1826, when the defendants (who had before then been chosen, and were then assignees of the bankrupt *John Mileham* under such commission of bankrupt,) sold by public auction the whole of the said goods and chattels on the premises, and received the proceeds thereof, together with the money of which the messenger possessed himself as aforesaid, and also such sums of money as had been realized by the sale of the goods on the premises during the possession of the messenger. The goods were demanded before the sale from the defendants, who refused to deliver them up.

Parke for the plaintiff. The question is, whether the assignees by relation under the old bankrupt law, or by virtue of the 108th section of the 6 G. 4. c. 16. (a), are entitled to retain possession of the goods in question against the plaintiff, who bought them under an execution completely executed before the bankruptcy. In

(a) By which it was enacted, "That no creditor having security for his debt, or having made any attachment in *London* or any other place by virtue of any custom there used, of the goods and chattels of the bankrupt, shall receive upon any such security or attachment more than a rateable part of such debt; except in respect of any execution or extent served and levied by seizure upon, or any mortgage of, or lien upon any part of the property of such bankrupt before the bankruptcy; provided that no creditor, though for a valuable consideration, who shall sue out execution upon any judgment obtained by default, confession, or *nil dicit*, shall avail himself of such execution to the prejudice of other fair creditors, but shall be paid rateable with such creditors."

Small-

Smallcomb v. Cross (*a*) it was held that goods were bound by a sale under a *fi. fa.*, although they ought to have been seized under a prior writ; and *Holt C. J.* says, “If a writ be delivered to the sheriff against *A.*, and before it be executed *A.* becomes bankrupt, the execution is superseded.” In *Cole v. Davies* (*b*) it was held that a seizure of goods under a *fi. fa.* was not affected by a subsequent bankruptcy. The seizure of the goods, then, was formerly the dividing point, and the question depends upon the 6 G. 4. c. 16. s. 108. Upon that section two things are clear: first, that the legislature meant to make a difference between judgments after verdict and those by confession or *nil dicit*; secondly, that the enactment cannot refer to all such judgments, for then the assignees might recover money levied many years before the bankruptcy. It is consistent with the words of the enactment to say that a creditor obtaining judgment after verdict has a right to the goods if they are seized before the bankruptcy, but that in the other cases he has no right unless the execution has been perfected by a sale. If at the time of the bankruptcy the party has no further need of his judgment, but has the fruits of it in his possession, the clause in question does not apply. In *Taylor v. Taylor* (*c*) this Court refused an application by the assignees of a bankrupt to set aside an execution issued before the bankruptcy, and intimated that it was a question for the Court of Chancery. If so, the present plaintiff is at all events entitled to the judgment of this Court.

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F. Pollock contra. The question certainly is, whether

(*a*) 1 *Ld. Raym.* 251. (*b*) 1 *I.d. Raym.* 724. (*c*) 5 *B. & C.* 392.

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the plaintiff is within the 6 G. 4. c. 16. s. 108. as “ a person availing himself of an execution?” It is contended that now the dividing point is the perfection of the execution, and that at all events the remedy of the assignees is in a court of equity only. An answer to the latter point may be derived from the 3 G. 4. c. 39. s. 2., which enacts that certain warrants of attorney shall be deemed void against the assignees, and then provides that they shall recover back all monies levied by virtue of any judgment upon such instruments. The statute in question has not any such provision in express terms; but where a party is by that enactment prevented from availing himself of an execution, it is reasonable to allow the assignees the same remedy as in the other case. [Bayley J. The party may by his own vigilance protect himself from the consequences of the 3 G. 4. c. 39.] As to the other, which is the principal question, the 81st section of the 6 G. 4. c. 16. must be taken into consideration. That makes certain transactions, and, amongst others, *executions*, valid, provided they were executed and levied two months before the issuing of the commission; but the 81st section does not mention judgments by confession or nil dicit, and therefore it seems that the legislature intended by the subsequent section to make such judgments invalid at all events. [Bayley J. The 81st section only applies where there has been a prior act of bankruptcy; it therefore differs altogether from the 108th. Your argument goes to the extent, that the assignees may at any period, even after the lapse of ten years, recover money levied under a judgment by confession.] If the argument is good, that certainly will be the consequence.

Lord

Lord TENTERDEN C. J. The plaintiff in this case seeks to recover the value of certain goods which were taken out of his hands by the defendants. He had become the purchaser of those goods from the sheriff, who had seized them under a fieri facias issued by the plaintiff against the bankrupt. The seizure and sale were perfect and complete before the act of bankruptcy; the plaintiff therefore, by the general rules and principles of law, is entitled to maintain this action, unless there be some legislative enactment to prevent it. It is said that the 6 G. 4. c. 16. s. 108. is such an enactment. The statute is certainly obscure; but I think that a reasonable construction has been given to it by the plaintiff's counsel; for it seems to me that the plaintiff is not within the class of persons therein mentioned. He was not at the time of the bankruptcy "a creditor having security," for he had been paid by means of the execution before the bankruptcy occurred. The section in question first provides that "no creditor having security for his debt, &c., shall receive upon any such security more than a rateable part of such debt;" then follows an exception of certain cases, "except in respect of any execution or extent served and levied by seizure upon or any mortgage of or lien upon any part of the property of the bankrupt before the bankruptcy." That applies to creditors having security, for a person who has levied by seizure is such a creditor: he has a security by his right to have the goods sold. Then comes the proviso that "no creditor, though for a valuable consideration, who shall sue out execution upon any judgment obtained by default, confession, or nil dicit, shall avail himself of such execution to the prejudice of other fair creditors, but shall be paid rateably with such creditors."

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Now that only limits the exception, and the exception applies only to cases falling within the first part of the section, viz. those of creditors having security. The present plaintiff was not at the time of the bankruptcy a creditor at all, and, therefore, cannot be within the operation of the statute. For these reasons, I am of opinion that the postea must be delivered to the plaintiff.

BAYLEY J. I am entirely of the same opinion. The proviso fastens upon and limits the exception, and that only; and I think that the exception does not apply to any class of persons who are not within the description in the former part of the section, "creditors having security for their debts." But the plaintiff at the time of the act of bankruptcy had ceased to be a creditor, and, therefore, is not affected by it.

HOLROYD and LITTLEDALE Js. concurred.

Postea to the plaintiff.

Wednesday,
May 16th.

DOE on the demise of J. PRIESTLEY and JANE his Wife, late JANE HUTTON, *against CALLOWAY.*

A surrender of a copyhold was duly made and presented by the homage, but no entry of such surrender and presentment was made on the court rolls:

Held, that such surrender and presentment might be proved by a draft of an entry produced from the muniments of the manor, and the parol testimony of the foreman of the homage jury who made such presentment.

EJECTMENT for the recovery of certain premises, consisting of a messuage and lands with the appurtenances, situate in *Weedon Beck*, in the county of *Northampton*, against the defendant as tenant in possession, but which ejectment was defended by the annuitants hereinafter mentioned. At the trial before

Holroyd

Holroyd J., at the *Northampton Summer assizes, 1825*, a verdict was found for the plaintiff, subject to the opinion of this Court on the following case:

The premises for the recovery of which the action was brought are copyhold tenements of inheritance holden of the manor of *Weedon Beck*, under the provost and fellows of *Eton College*, who are the lords of the manor. *Thomas Bennett*, hereinafter mentioned, was seised in fee of the premises in 1790. The following written document brought from among the muniments of the manor of *Weedon Beck* was given in evidence on the part of the plaintiff: “The manor of *Weedon Beck*, in the county of *Northampton*. The 1st day of *May*, in the year of our Lord 1790. Be it remembered, That on the day and year above-written, *Thomas Bennett*, late of *Weedon Beck* aforesaid, but now of *Buckingham*, in the county of *Bucks*, grazier, a customary tenant of the manor aforesaid, and *Elizabeth* his wife, did out of court surrender by the rod into the hands of the lords of the said manor, by the hands and acceptance of *Thomas Hearne*, Gent. (deputy-steward of the same manor, and for this turn and purpose only lawfully constituted and appointed), the said *Elizabeth* being solely examined apart from her said husband, by the said deputy-steward, and consenting, according to the custom thereof, all that messuage, &c. (setting out the premises for which the action was brought), to the use and behoof of *Jane Hutton* of *Maids Morton*, in the county of *Bucks*, spinster, and of her heirs and assigns for ever, according to the custom of the said manor, by the rents and services therefore due and of right accustomed: Provided always, nevertheless, that if the said *T. Bennett*, his heirs, executors, or administrators, or any of them,

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PAINTLEY
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FREIGHTLEY
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do and shall well and truly pay or cause to be paid unto the said *Jane Hutton*, her executors, administrators, or assigns, the full sum of 1000*l.*, at the rate of 4*l.* 10*s.* for every 100*l.* by the year, upon the 1st day of *November* now next ensuing the day of the date of these presents; then this present surrender shall be void and of none effect, or else be and remain in full force.

“ Taken out of court

“ *Thomas Bennett.*

the day and year first

“ *Elizabeth Bennett.*

above-written, by me,

“ *Thomas Hearne,*

“ Deputy-steward.”

Under the signatures in the surrender was written a memorandum in the following words: “ Presented by *David Atchison*, foreman of the jury, at a court held the 10th day of *December 1792*.” By the custom of the manor surrenders may be taken out of court by a deputy-steward, and surrenders so taken may be presented at any subsequent court. There is no limited time for presenting such surrenders: sometimes they are presented many years after they are made, although there may have been courts holden in the mean time. A written document or paper (the first two sheets whereof were missing), brought from among the muniments of the manor of *Weedon Beck*, and relating to the proceedings of the court of the 10th *December 1792* was given in evidence on the part of the plaintiff; and that part which related to the premises in question began thus: “ At this Court it is found by the homage, that on the 1st day of *May*, in the year of our Lord 1790, *Thomas Bennett*, late of *Weedon Beck*, &c.” (setting out a surrender by the said *T. Bennett* similar in terms to the one before mentioned.) The document lastly

above

above set out is endorsed with these words, "Draft of Court for *Weedon Beck, 92*," in the hand-writing of one *Smith*, a clerk of Mr. *T. Barnard*, the then steward of the manor. *Barnard* died in 1796, *Smith* died in 1818. The last-mentioned document was tendered in evidence on the part of the plaintiff, and objected to on the part of the defendant, but admitted by the learned Judge, subject to the opinion of this Court both as to its admissibility and its legal effect. *David Atchison* was foreman of the jury at a court holden for the manor of *Weedon Beck* on the 10th of *December 1792*. The surrender of *Thomas Bennett*, in writing above set out, was brought to him at the said court as foreman of the jury, by *John Harris*, the then bailiff. He took it, and presented it to Mr. *Thomas Barnard*, the steward, to be enrolled. The presentment was the act of the homage, and presented by *Atchison* as foreman of the jury, and he at the same time wrote the memorandum now appearing on the surrender, and above set out. Mr. *T. Barnard*, the steward of the manor, received the presentment from *Atchison*, and demanded half a guinea for the inrolling of the said surrender, which was paid by *John Harris*, the then bailiff, on behalf of the mortgagee. The above-mentioned facts as to the holding of the court on the 10th of *December 1792*, and as to all the proceedings which took place at that court, were proved by the said *David Atchison* from memory. This evidence was objected to on the part of the defendant, but received, subject to the opinion of this Court as to its admissibility. Much other business was done at the same court (some of which is referred to as done at a court of that date by the rolls of subsequent courts); but no other written document appeared to have been made at that

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court, except the draft of the roll before mentioned relating to the premises in question, and which relates also to other business of the manor done at the same court: nor does there appear on the court rolls any entry of a court being holden in 1792, unless the Court should be of opinion that the draft above mentioned can be considered as a court roll; nor has there been any mutilation of or erasure in the existing court rolls. Interest was duly paid to the mortgagee for 1000*l.* up to the year 1818; but it did not appear to have been so paid with the knowledge of the defendant, or of *Horlock* or *Yems*, or their trustees. On the 19th of *June* 1820 a court was duly holden, the proceedings of which, as far as relates to the premises in question, are contained in the following entry in the court rolls: "The manor of *Weedon Beck*, in the county of *Northampton*. The special court baron of the provost and college royal of the blessed *Mary of Eton*, nigh *Windsor*, in the county of *Bucks*, holden in and for the said manor, on *Monday* the 19th day of *June*, in the year of our Lord 1820, before *Edward Brown*, Gent., the deputy of *Abraham Moore*, Esq. chief steward of the said manor. At this court the homage present that at a court holden in and for the said manor on the 10th day of *December* 1792, a certain conditional surrender, bearing date the 1st day of *May* 1790, from *Thomas Bennett*, then late of *Weedon Beck* aforesaid, but then of *Buckingham*, grazier, a customary tenant of the said manor, and *Elizabeth* his wife, of all his copyhold or customary messuages, lands, tenements, and hereditaments whatsoever lying within and holden of the manor of aforesaid, to the use of *Jane Hutton*, of *Maids Morton*, in the county of *Bucks*, spinster, and of her heirs

heirs and assigns for ever, for securing the repayment of 1000*l.* and lawful interest, was duly presented by the homage at that court for enrolment, but which, through inadvertence of the steward, was omitted to be done; the homage therefore again at this court present the said conditional surrender in the words and figures following." Then follows the surrender first above set out. On the 15th of *May* 1823, at a manor court holden for the manor of *Weedon Beck*, the lessors of the plaintiff were duly admitted tenants to the said premises, on the said surrender of *Thomas Bennett* and *Elizabeth* his wife, according to the custom of the manor. On the part of the defendant, it was proved, that *Thomas Bennett* died, leaving a son, *John Bennett*, his heir at law, who was admitted 22d *October* 1807. *John Bennett* sold the premises to one *Thomas Smith*, who was admitted 27th of *October* 1808, and who on the 12th of *December* 1814 granted an annuity to *Horlock* and *Yems* for 1998*l.*, and duly surrendered the premises to trustees (who, previously to the completion of the purchase, searched the court rolls at *Eton* for incumbrances, but found none,) by surrender dated 12th *December* 1814, and which surrender was duly presented and entered on the court rolls at the next court, holden 3d *May* 1815, and the said trustees were admitted the 28th day of *February* 1824.

S. M. Phillipps for the lessors of the plaintiff. A complete title was proved in the lessors of the plaintiff. *Bennett* was seised in fee: he surrendered out of court to one of the lessors of the plaintiff (*Jane Hutton*) evidently by way of mortgage. The surrender was in 1790, the admittance in *May* 1823. It is true that the surrender

must

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must be presented in court; and by the general rule of copyhold law, at the next court; but by custom it may be at any subsequent court, *Comyns's Dig. Copyhold*, tit. *Presentment*, *Moor v. Moore* (*a*). The only question is, whether there was any sufficient proof of a presentment of the surrender. The fact of presentment is a matter in pais to be proved as any other fact by the rolls of the court, if there are any rolls which shew it; if not, by other competent evidence. A written document offered in evidence, and admitted as proof of the presentment, was properly admitted; for, first, it must be taken to be a roll of the court. The surrender was regularly delivered by the foreman of the jury to the steward for enrolment, and the fee for enrolment was paid by *Harris*, as agent of the surrenderee, and received by the steward. An entry of this presentment was accordingly made, and preserved amongst the muniments of the court: the document in question is that entry. It is full and formal in every respect, and complete as an enrolment. It is therefore a roll of court. If this document was not an original roll of court, it may be receivable as secondary evidence, for after admittance and after presentment for enrolment, it may be presumed that an enrolment, if necessary, was actually made, and that that roll has been lost. If the document is neither a roll nor secondary evidence of a roll, still there is sufficient proof of the fact of the presentment of the surrender; for there is no rule of law that a presentment of a surrender cannot be proved without writing. There was good parol evidence of the fact of surrender by *Atchison*. At all events, there was a good

(a) 2 *Ves. 601.*

present-

presentment in June 1820, and although that was after the admittance of the person under whom the defendant claims, yet the presentment is no part of the title, but refers back to the time of the surrender.

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Pennington contrà. It must be admitted, that if the document be an original court roll, the title of the plaintiff is complete. The usual evidence as to the title of copyhold lands is the roll of court or the copy of the roll. In *Co. Litt.* section 75. it is said, that "copyhold tenants are called tenants by copy of court roll; because they have no other evidence concerning their tenements, but only the copies of court rolls," and in *Kite* and *Quinton's* case (*a*), the same rule is laid down. In *Calthorpe on Copyholds*, 47., it is said, "If the lord in open court doth grant a copyhold land, and the steward maketh no entry thereof in the court rolls, this is not good, though it be never so publicly done, nor no collateral proof can make it good." He then says, "If the rolls be also lost, yet it seemeth that by proof he can make this good." But in that case the loss ought to be proved by a person who has seen the supposed roll. In the present case there was not any roll relating to the presentment, and the parol evidence was not admissible to shew that such a roll ever existed. It must be admitted that rolls are not records: they may be set right in case of mistake by parol evidence, *Towers v. Moor* (*b*). It is there said by the Court, that in case of a surrender made by a steward of a copyhold, if there be any mistake, that is only matter of fact, and the courts of law will admit an averment that there was a mistake either as to the lands or uses. [Holroyd J. If you may give parol evidence

(a) 4 Co. 25.

(b) 2 Vern. 98.

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against
CALLOWAY.

of a mistake as to the premises, then there is no evidence of title by the roll.] Then as to the presentment of the surrender made in 1820, that is void for two reasons: first, it was too late; secondly, it was informal.

A presentment by the general custom ought to be made at the next court day immediately after the surrender; but by special custom in some places it will serve at the second or third court, *Coke's Copyholder*, 88., *Gilbert's Tenures*, 280. There is no authority to shew that a custom to make a surrender at any indefinite time is good: it would be an unreasonable custom, and therefore not to be supported. But if not too late, still the presentment in 1820 was informal and insufficient. First, there was no legitimate evidence before the jury that there was a surrender. Secondly, the jury do not present that the surrender was out of court.

Phillipps in reply. The passage cited from *Littleton* imports, that the court rolls are the only evidence of title which the tenants receive from the lord, and not that they are the only evidence admissible to prove title. (a)

Cur. adv. vult.

Lord TENTERDEN C. J. The question in this case is, whether the surrender of a copyhold made out of court was sufficiently proved to have been presented in court, so as to give the plaintiff a valid title. If a surrender and presentment can be proved by any other evidence than an entry on the rolls of the court, it was abundantly proved in this case. It appeared that a surrender made in 1790 was presented by the homage for enrolment in 1820, and was then enrolled. But that

(a) This case was argued on *Tuesday, May 9th.*

present-

presentment and enrolment could only be good by virtue of a custom to present a surrender at any subsequent court. It is not necessary in this case to give an opinion, whether such a custom is good in point of law: but I must say that I should have great difficulty in holding that such a custom is valid. In this case, however, it was proved that a surrender was made out of court on the 1st of *May* 1790, but it was not presented at the next court. The surrender was taken by the deputy-steward out of court, and it was in fact presented in court by the homage on the 10th day of *December* 1792. That was proved by the actual production of a surrender from the muniments of the lord, with an indorsement, in the handwriting of the steward, purporting that it was presented by *Atchison* at a court holden on the 10th of *December* 1792; and *Atchison*, the person mentioned as having made the presentment, being still living at the time of the trial, was examined, and spoke to the fact. Then a paper was produced containing a perfect entry of the surrender and presentment. But the question is, whether, independent of any entry on the rolls, the evidence I have stated can be sufficient to shew that the surrender was made, and presented so as to give a title under it? It has been said that the title to a copyhold can be proved by nothing but the court rolls, and *Littleton*, s. 75., was cited in support of that position. I apprehend, that *Littleton* means that the roll is the proper evidence of the copyholder's title, in contradistinction to other species of evidence as to matters in pais or matters of record, as a charter, or a fine and recovery. If it were to be held that the title to a copyhold could be proved by nothing but the court roll or a copy thereof, great inconvenience might ensue. Suppose all the rolls of the manor to be destroyed by

accidental

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accidental fire, and copies either not to have been delivered out (which too often occurs), or actually to have been delivered to the tenant and lost, so writings of that description, which are contained in a small compass, may easily be, could it be said that all the copyholders who had not copies to produce would have no title to their estates? I think it is impossible to maintain such a proposition. If it cannot be said that the production of the roll itself, or of a copy taken from that roll, is the only evidence, it seems to me that in the case before the court, there was abundant evidence to satisfy all that the law requires. There have been cases decided in courts of law which shew that the entry on the roll is not conclusive upon the parties, but that a mistake in the entry may be shewn by averment in pleading, or by evidence before a jury. That has been decided in two instances: one of them related to a mistake in the date. By the court roll it appeared that the court was held on a particular day: that day did not answer the purpose of the party producing the roll; and it was held that he might, notwithstanding that entry on the roll, shew that the court was not held on the day there mentioned, but on another. That was decided in *Burgess v. Foster* (a). In that case the surrender was entered on a roll of the court dated the 2d of *May*, and the letter of deputation to the steward, before whom it was taken, was dated the 3d of *June* in the same year; and the Court were clearly of opinion, "that the mis-entry of the date of the court should not prejudice the party, for that entry was not matter of record, but was but an escape; and if the parties had been at issue upon the time of the surrender made, or of the court holden, the same should not be tried by

(a) 1 *Lev.* 289.

the

the rolls of the manor, but by the country, and the party might give in evidence the truth of the matter, and should not be bound by the roll; and according to this resolution of the Court judgment was given." In *Brend v. Brend* (a), a father being seised of freehold and copyhold lands, settled the same upon his second son and his issue male, upon the death of his eldest son without issue male, and covenanted to surrender his copyholds to those uses; but instead thereof, the surrender was entered on the roll to the use of the heirs general; this surrender was vacated by a decree, and a new surrender made according to the settlement; this was a decision in equity. In another case, words were added to the roll to pass other lands. In *Coke's Copyholder*, s. 40., it is laid down, "that if a conditional surrender be presented, and the steward in entering it omitteth the condition, yet upon sufficient proof made in court, the surrender shall not be avoided, but the roll amended; and this shall be no conclusion to the party, to plead or give in evidence the truth of the matter;" and *Kite* and *Queinton's* case (a) is to the same effect. There is an anonymous case in *Lord Raym.* 735., in which Lord *Holt* ruled, at Nisi Prius, that the rough draft of the steward of the manor was good evidence of the admittance. It does not appear whether, in that case, a fair roll had been engrossed and lost; but I cannot think that material. The draft may have been not a copy, but the original from which the roll was afterwards to be made out. The draft itself is more in the nature of an original than the copy, though the latter is more convenient for reference, and therefore is the document which is generally resorted to. For these reasons we, who

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(a) *Cas. temp. Finch.* 254.(b) *4 Coke,* 25.

beard

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heard the case argued, are of opinion that there was sufficient proof to entitle the plaintiff to recover.

Postea to the plaintiff. (a)

**Deo dem.
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against
CALLOWAY.**

(a) *Bayley J.* had left the court before the case was argued.

BASTOCK against RIDGWAY.

A parish cannot legally be divided for the relief and maintenance of the poor, unless it cannot otherwise have the full benefit of the 43 Eliz. c. 2.

THIS was a feigned issue to try whether the hamlet of *Singleborough*, in the parish of *Great Horwood*, in the county of *Buckingham*, was legally separated and divided from the township of *Great Horwood*, in the same parish, for the relief and maintenance of the poor. At the trial before *Alexander C. B.* at the *Buckinghamshire* Summer assizes 1825, a verdict was found for the plaintiff subject to the opinion of this Court on the following case:

The parish of *Great Horwood* consists of the township of *Great Horwood* and of the hamlet of *Singleborough*, which hamlet is a distinct and immemorial vill. The township of *Horwood* contains about 3000 acres, consisting almost entirely of open fields and waste or common lands. The case then proceeded to state a variety of facts relating to the extent and population of the parish. It appeared also, that bastardy bonds and certificates had, from 1679 down to 1753, been sometimes given to the overseers of the poor of *Great Horwood cum Singleborough*, sometimes "to the overseers of *Great Horwood*," and at others to the overseers of *Singleborough*. On the 8th of October 1690, an agreement under the hands and seals of *Hugh Barker* and thirty-two other persons, including the rector of the parish therein

therein described as of *Great Horwood* and *Singleborough*, whereby they did agree to have a house built at *Singleborough* for the use of *W. Gayton*, at the costs and charges of *Horwood* and *Singleborough*, and so to continue for the use of the poor of *Singleborough*, each hamlet paying their usual proportionable allowance for their relief; and that the poor of *Singleborough* and *Horwood* be kept in their respective hamlets.

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On the 24th *April 1753* the following agreement was made by and between the churchwardens and overseers of the poor of the township of *Great Horwood* and certain inhabitants of the said township, and the churchwardens and overseers of the poor of the hamlet of *Singleborough* and certain inhabitants thereof: " Articles of agreement indented, made, concluded, and agreed upon, this 24th day of *April 1753*, between *J. H.* and *J. J.*, churchwardens, and *W. K.* and *H. C.*, overseers, and *W. K.*, *R. W.*, *R. B.*, *W. C.*, *N. W.*, *H. H.*, *T. E.*, and *T. V.*, and others, whose hands and seals are hereunto set and subscribed, occupiers of lands and tenements within the town, precincts, or division of *Great Horwood*, in the county of *Bucks*, for and on the behalf of themselves, and as far as by law they can on the behalf of the future churchwardens and overseers and occupiers of lands and tenements within the said town, precinct, or division, of the one part, and *T. B.* churchwarden, and *T. B.* senior overseer, and *T. B.* the elder, and *T. B.* the younger, and *J. H.* and others whose hands and seals are hereunto set and subscribed, occupiers of lands and tenements within the hamlet, liberty, or division of *Singleborough*, in the parish of *Great Horwood* aforesaid, on behalf of themselves, and, as far as by law they can, on behalf of all and every future and succeeding churchwardens and overseers and occupiers of lands within the said hamlet,

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of the other part, as follows : Whereas frequent disputes do arise between the occupiers of lands in the said town and the said hamlet, concerning the reception of poor persons sent by orders or otherwise to each of the said places, and concerning the proportion of the poor-rates to be raised in each place, occasioned in some measure by considerable private donations, given for the maintenance and relief of the poor of one place, independent and exclusive of the other, by which great expenses frequently are incurred, disorder and confusion do ensue, and the poor by such means become more burthensome than they otherwise would be," &c. The articles of agreement then provided, that for the future each district should separately maintain its own poor, and that the township and hamlet should, in all respects concerning the poor, be considered as two different and distinct parishes. It then provided for the divisions of certain private donations and of the almshouses between the two districts. There was then a covenant to support and keep the articles of agreement, and to admit the same as evidence in any controversy which might arise touching the poor of either of the said places. Ever since the date of this agreement the township and hamlet respectively have maintained their poor separately, and paupers have been removed by orders of justices from foreign parishes to the township and hamlet respectively, and from the hamlet to the township.

Since the year 1753 there have been separate poor-rates for the township and hamlet, and likewise separate appointments of overseers of the poor, with the exceptions hereinafter mentioned ; that is to say, that in each of the years 1815, 1816, and 1817, a joint appointment of overseers of the poor of the whole parish was made by two justices of the peace, on the application of the in-

habitants

habitants of the township of *Great Horwood*, without the consent and against the will of the inhabitants of the hamlet of *Singleborough*; but notwithstanding such joint appointments of overseers, the poor of the hamlet of *Singleborough* continued to be maintained and employed by the inhabitants thereof separately as theretofore, and without any interference on the part of the overseers or inhabitants of the township of *Horwood*, and separate rates were likewise made by the township and hamlet respectively for the relief of their respective poor.

If the Court should be of opinion that the legal presumption to be formed from the facts stated is, that the hamlet of *Singleborough* was legally separated from the township of *Great Horwood*, for the relief and maintenance of the poor, the verdict to stand, otherwise a verdict to be entered for the defendant.

B. Monro for the plaintiff. The hamlet of *Singleborough* has, for the purpose of maintaining its own poor, been legally separated from the township of *Horwood*. It may have been lawfully separated, if, at the time of the passing of the 13 & 14 Car. 2., the parish could not reap the benefit of the statute of the 43d of *Elizabeth*; *Rex v. Leigh* (a), *Rex v. Walsall* (b). In the former case *Buller J.* states, that the meaning of that phrase is not that it is absolutely *impossible* for the inhabitants of a parish to maintain their own poor, *as a parish*, for that would not be the case, even if the parish were 100 miles in circumference, but that it is *inconvenient* for them so to do. Then the question is, has this parish had the benefit of the stat. 43 *Eliz.* conveniently? For seventy-two years it has not had that benefit, for there were removals, not only from foreign parishes to the

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against
Ridgway.

(a) 3 T. R. 746.

(b) 2 B. & A. 157.

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hamlet of *Singleborough* and the township of *Horwood*, but also from the hamlet to the township. It appears that even prior to those seventy-two years the parish had not the full and ordinary benefit of the statute of *Elizabeth*. For, by an instrument made in 1690, it was agreed that the poor of *Singleborough* and *Horwood* should be kept in their respective hamlets. [*Bayley* J. It does not appear by that agreement that it was in consequence of the largeness of the parish that it could not receive that benefit.] The agreement shews that *Horwood* and *Singleborough* could not at that time conveniently maintain their poor jointly. The enacting words of the 13 & 14 Car. 2. are general, and it has never been decided that it shall be restrained by the recital to those cases only where the largeness of the parish is the only cause why it cannot have the benefit of the statute of *Elizabeth*. In *Rex v. Leigh* (*a*), the parish was only five miles long and four broad. Here are 4000 acres in the parish, and *Singleborough* contains only one fourth of the whole. In 1714 a certificate was given, directed to the churchwardens and overseers of the poor of the hamlet of *Singleborough* and parish of *Great Horwood*. The agreement of 1753 shews indeed that the private donations have in some measure been the cause of disputes between the hamlet and the township. But it does not state that it was the sole cause of those disputes. That agreement shews that at that time there was a necessity for a division. If the Court should now be of opinion that a joint appointment of overseers should be made, what security is there that the same expense which was obviated by the agreement would not be again incurred? In an anonymous case (*b*), recognized by Lord Kenyon in *Rex v. Newell* (*c*),

(a) 3 T. R. 746. (b) *Sir Thos. Raym.* 476. (c) 4 T. R. 266.

where

where the different districts of a parish had distinct officers, made distinct rates, and kept distinct accounts, it was held that they were entitled to maintain their own poor separately. In *Rex v. Leigh* (a), a township having for sixty or seventy years, and before, for any thing that appeared to the contrary, had separate overseers, and maintained its own poor separately from the parish at large, was held to be entitled to that privilege.

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Bligh, contra, was stopped by the Court.

Lord TENTERDEN C. J. The question reserved for our opinion on this special case is, whether the legal presumption to be formed from the facts stated in this case is, that the hamlet of *Singleborough* has been legally separated from the township of *Horwood* for the purpose of maintaining and relieving the poor. Now if we look to the statute 13 & 14 Car. 2. c. 12. s. 21. on which the separation must be founded, the largeness of the parishes is expressly put forward as the ground on which in particular parishes the benefit of the statute of *Elizabeth* cannot be enjoyed. I do not mean to say that because the largeness of the parishes is there expressly mentioned, that it is therefore the only ground by which the benefit of the statute of *Elizabeth* is not to be had; for that benefit might be lost by reason of the superabundant population in a district not itself exceedingly large. But still there ought to be something to shew that the parish has not had or could not have had the benefit of the statute. Now looking at the present state of things in this parish, I can see nothing to justify me in saying that it cannot now have the benefit of the statute 43 Eliz. c. 2.; and looking at the former state of

(a) 3 T. R. 746.

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against
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things, I cannot see any thing to shew that it might not have had the benefit, nay the full benefit, of that statute. It appears that in 1753 the hamlet and township thought fit to separate; and the instrument of separation (which, however, is clearly invalid, unless it be founded on that necessity which the statute points out) recites that frequent disputes had arisen between the occupiers of lands in the town, precinct, or division of *Great Horwood* and hamlet of *Singleborough* concerning the reception of poor persons sent by orders to each of the said places, and concerning the proportion of the poor-rates to be raised in each place, occasioned in some measure by considerable private donations given for the maintenance and relief of the poor of one place independent and exclusive of the other, by which great expenses were incurred, and disorder and confusion ensued, and the poor became more burdensome than they otherwise would have been. All I can infer from this is, that there had been disputes arising out of a want of proper knowledge of and attention to the subject; not that there was any real difficulty in the whole parish maintaining its poor, but that the inhabitants of the hamlet and of the township thought fit to dispute. Their disputes are stated to have been occasioned in some measure by private donations. That does not shew that they could not have the benefit of the statute of *Elizabeth*. These donations, if properly administered, could have created no difficulty; for supposing all the rates of the whole parish applicable to the maintenance of the poor generally, the private donations would not be applicable to the relief of the whole poor, but would only be properly applied to those who did not receive any aid from the poor-rate, but who, having a little assistance from another quarter, were thereby enabled to

maintain

maintain themselves. If those donations had been so applied, no difficulty would have arisen in the general distribution of the funds of the whole parish to the maintenance of the poor. I cannot say on these facts that any legal presumption arises that this parish could not have the benefit of the statute of *Elizabeth*. The agreement by which the separation was intended to be effected took place no later than 1753. In *Rex v. Walsall* (*a*), the separation took place very soon after the passing of the statute 13 & 14 Car. 2. Now there could not be any legal valid separation between the 43 *Eliz.* and the 13 & 14 *Car. 2.* But when we find (as soon as an act of parliament makes a separation lawful, in a case where a parish could not have the full benefit of the statute of *Elizabeth*,) such a separation actually taking place, that is to my mind abundant evidence that at, and even before that very time, it had been thought that the parish could not have the benefit of the statute of *Elizabeth*. But this inference by no means arises in a case where the separation has taken place by agreement made so late as the year 1753. Upon the whole, I am of opinion that there is no ground for presuming that the hamlet of *Singleborough* has been legally separated from the township of *Horwood*, for the purpose of maintaining its own poor.

BAYLEY J. I entirely agree with my Lord. This question turns upon the statute 13 & 14 *Car. 2. c. 12. s. 21.* which recites, "that the inhabitants of the several counties therein named, and many other counties in *England* and *Wales*, by reason of the largeness of the parishes within the same, have not nor cannot reap the benefit of the statute passed in the forty-third year of

(*a*) *2 B. & A. 157.*

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Elizabeth,

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Elizabeth, for the relief of the poor;" and then enacts, "that the poor within every township or village shall be maintained within the township or village wherein they were last lawfully settled." That clause, therefore, applies to all the townships of the kingdom, where, by reason of the largeness of the parish, the inhabitants cannot have the benefit of the statute of *Elizabeth*. Now in this case, what is there to satisfy our minds that the inhabitants of this parish cannot have the benefit of the statute of *Elizabeth*? Mr. Monro, who has put this case as clearly and as strongly as it can be put, relies, to a certain degree, upon something that passed in the year 1690, and from that he infers, that at that period of time a separation took place. To constitute a valid separation of the hamlet and township, there ought to have been not only a separate collection of funds, but a separate and distinct application of the funds themselves; for although certain proportions of the funds may have been collected immemorially in particular districts within the parish, yet if they all afterwards constitute one entire fund, and were applied to maintain the poor of the parish generally, it cannot then be said of that parish, that by reason of its largeness it could not have the benefit of the statute 43 *Eliz.* The document of 1690 shews very clearly, that at that period of time the fund was not separate, but entire. That was a bargain whereby a variety of persons, living, some in *Horwood* and some in *Singleborough*, agreed that they would at the costs and charges of *Horwood* and *Singleborough* build a house for the use of *W. Gayton*, and so to continue for the use of the poor of *Singleborough*. Now why was *Horwood* to contribute to the expense of building a house for the poor of *Singleborough*, and of continuing it for the benefit of the poor of *Singleborough*,

unless

unless at that time there was one entire fund and one joint obligation to maintain the poor; and unless at that time *Singleborough* and *Horwood* had been one parish, and not separated so as to be excluded from enjoying the benefit of the statute of *Elizabeth*? The agreement of 1753 seems to me to explain distinctly upon what principle it was, that from that time there was to be a separation, and to trace the cause of that separation to be, not the inability of the parish to reap the benefit of the statute of *Elizabeth*, but the convenience of the parties. It recites, that disputes had arisen between the occupiers of lands in the town and the hamlet. If at and before that period of time each had maintained its own poor out of a separate and independent fund, there would have been no such recital. It shews clearly that at that time there was one entire fund; that the inhabitants were from time to time differing among themselves, not with any legal foundation for such difference, but differing, as persons who do not understand what the law is are likely to differ, because the burdens of the poor of a part of one entire parish fell heavier on the whole parochial fund than the richer part of the parish thought right, and therefore they came to an agreement to separate, and not because they could not have the benefit of the statute of *Elizabeth*. Private donations are stated to have formed one of the grounds of these differences; but it is quite clear that in fixing the quantum of rate, those donations ought not to have been considered; for they were intended not to relieve the richer part of the parish from the contribution in shape of poor-rate, but to be given gratuitously to the poorer part of the parishioners, exclusively and independently of the poor-rate. In *The King v. Newell*,

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Newell (a), the parish consisted of two separate districts, each of which immemorially made a separate rate, but the money, when raised, was blended together in one joint fund, though applied in certain proportions; and it was held, that that was no evidence to shew that the parish could not have the benefit of the statute of *Elizabeth*; and if that be so, then this subdivision is referable to an agreement binding on those persons only who happened at that time to be parishioners; for the inhabitants of a parish at one period of time cannot by agreement bind all the parishioners at another. For these reasons, I am of opinion, that the issue in this case ought to have been found for the defendant.

HOLROYD and LITTLEDALE Justices concurred.

Postea to the defendant.

(a) 4 T. R. 266.

Friday,
May 18th.

WILMOT *against* WILKINSON.

Where, by an instrument in writing (not under seal), *A.*, in consideration of 700*l.*, agreed to present to a rectory, on the next avoidance, such person as *B.* should nominate, and to furnish an abstract and execute a conveyance of the next presentation to *B.*: Held, that this agreement did not require an ad valorem stamp.

A. afterwards, with the assent of *B.*, agreed to sell the next presentation to *C.*, and to convey such title as he (*A.*) had received, in consideration of 7500*l.*, of which 500*l.* was to be paid to *B.* on a certain day. *A.* furnished an abstract of such title as he had, but *C.* refused to take it, and no conveyance was tendered to him. In an action by *B.* against *C.* for the 500*l.*: Held, that there was a sufficient consideration for *C.*'s promise to pay it, and that *A.* was not bound to make a marketable title, but only to convey such as he had received, and that as *C.* refused to accept that title, it was not necessary to tender a conveyance.

plaintiff

plaintiff as follows : " Agreement between the undersigned *M. Buzzard*, on behalf of himself and his partner *John Goodacre*, and their respective heirs, executors, and administrators, of the one part ; and the undersigned *Edward Coke Wilmot*, on behalf of himself and his heirs, executors, and administrators, of the other part, as follows : In consideration of the sum of 7000*l.* of lawful money of *Great Britain* to be paid in manner hereinafter mentioned, he the said *M. Buzzard* doth hereby, for himself and his said partner *J. Goodacre*, agree to present such person to the rectory of *Presteigne*, in the county of *Radnor*, vacant by or immediately upon the death, resignation, or sooner determination of the incumbency of the present incumbent, with all the great and small tithes, oblations, &c. as he the said *Edward Coke Wilmot*, his executors, &c. shall nominate or appoint ; and further, that *M. Buzzard* shall forthwith furnish an abstract of title to the same presentation, and deduce, at the cost and charges of himself and his said partner, or one of them, a good, valid, and marketable title to the same ; and also execute a proper conveyance of the same to him the said *E. C. Wilmot*, his executors, &c. : such conveyance to be prepared at the expense, costs, and charges of the said *E. C. Wilmot*, his executors," &c.

On the 12th of *July* 1824 another agreement was entered into between the said Messrs. *Goodacre* and *Buzzard* and the defendant, as follows : Memorandum, *July* 12th 1824, Messrs. *Goodacre* and *Buzzard*, with the consent of *E. C. Wilmot*, agree to sell to *Thomas Wilkinson* the next presentation to the living of *Presteigne*, *Radnorshire*, which they have purchased of *Lord Oxford*, for the sum of 7500*l.*, to be paid for at *Michaelmas* next, on having such title as they have received from *Lord Oxford*

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Oxford and Lord *Harley*, and their trustee Mr. *Moore*, with their covenant for return of the money in the event of their being unable to procure the nominee of Mr. *Wilkinson* induction and quiet possession of the living for six months after the next vacancy of the same. Mr. *Wilkinson* to have the option of paying the 7000*l.*, part of the 7500*l.*, absolutely to Messrs. *G.* and *B.*, or to have the same invested in their names and that of Mr. *Wilkinson*'s trustee; he, Mr. *W.*, paying interest at 5*l.* per cent. on the 7000*l.*, and receiving the dividends or interest resulting from the same, Mr. *Wilkinson* paying at *Michaelmas* the remaining 500*l.* absolutely to Mr. *Wilmot*, with *G.* and *B.*'s consent.

At the foot of which agreement was written and signed by the plaintiff as follows: "I hereby ratify, on my part, the above agreement."

The above-mentioned agreement of the 22d of *March* 1824 was stamped with a 1*l.* stamp. An abstract of the title to the said next presentation was delivered to the defendant's attorney on or about the 20th day of *June* 1824, and two original deeds of the 18th day of *July* 1823, whereby Lord *Oxford*, Lord *Harley*, and Mr. *Moore*, conveyed to *Goodacre* and *Buzzard*, were in due time shewn to and examined by the defendant's attorney, and were well executed, and corresponded with the said abstract. But no other of the deeds or muniments of title set forth in the said abstract were at any time produced to the defendant or his attorney. The defendant, after *July* 1824, offered the benefit of his interest under the said agreement, for sale, such as it was, if the purchaser chose to take his chance. After the death of *Buzzard*, and before the 29th of *September* 1824, *Goodacre*'s attorney required

required the defendant to pay the 7000*l.*, and offered to enter into a covenant pursuant to the said agreement. The defendant required *Goodacre* and *Buzzard*'s attorney to give him an inspection of the other deeds mentioned in the abstract, which he did not do, declaring it was not in his power. The plaintiff on the 29th of September 1824 demanded the 500*l.*, but never tendered any draft of a conveyance to the defendant. *Buzzard* died on the 22d day of October 1824. *Goodacre* did not assent, but objected to the payment over of the 500*l.* to the plaintiff. No evidence was given, on the part of the plaintiff, of any assent by the devisees, or representatives of *Buzzard*, or by *Moore*. No money was ever paid by the plaintiff to *Goodacre* and *Buzzard*, or either of them.

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Chitty for the plaintiff. The first objection raised at the trial was upon the sufficiency of the stamp on the agreement. It had the usual agreement stamp of 1*l.*, and that was sufficient, the instrument not being itself a conveyance. Then it appears that the vendors did all that could be required of them towards the completion of the purchase; they undertook to sell the interest which they had received from Lord *Oxford*; and they exhibited the deeds by which that interest was conveyed to them. Nor was it necessary that a conveyance should be tendered to the defendant; for as the agreement was silent as to the expenses, they would fall upon the purchaser; he, therefore, after the abstract was delivered, was bound to have a conveyance prepared. Lastly, the assent of *Goodacre* and the other parties to the payment of the 500*l.* was not requisite: the agreement is to pay 500*l.* to the plaintiff absolutely on a certain day.

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D. F. Jones contra. If the instrument of the 22d of March 1824 was nothing more than an agreement, the stamp would no doubt be sufficient; but if a vacancy in the church of *Presteigne* had happened before any formal conveyance was executed, a court of equity would upon that instrument have decreed to the purchaser the next presentation; it should, therefore, have had an ad valorem stamp upon the amount of the purchase-money. [*Bayley* J. A court of equity might have compelled the execution of a conveyance; but by the stamp act the ad valorem duty is imposed upon the conveyance of an interest, not upon the right to call for such conveyance. *Littledale* J. You must take the stamp as it was or was not sufficient at the time when the agreement was executed.] Next, the plaintiff is not in a situation to sue, the contract between *Goodacre* and *Buzzard* and the defendant not having been completed, and the vendors not having consented to the payment of the 500*l.* to the plaintiff. The word *absolutely* is relied on to shew that the plaintiff's right is independent of those circumstances; but that word was introduced not in the sense of "at all events," but in contradistinction to the option reserved to the defendant as to the sum of 7000*l.* The remaining question relates to the title which the vendors were bound to make. The fair meaning of the agreement is, that they should convey Lord *Oxford's* title, and then it would be incumbent on them to shew that he had a marketable title according to the stipulation in the former agreement.

Lord TENTERDEN C. J. I am of opinion that the plaintiff is entitled to recover the 500*l.* demanded in this action. The objection taken to the stamp has been already

already answered. Whatever was the language of the instrument, it could not operate as a grant of the next presentation, not being under seal; but I think that this instrument was not intended so to operate. Then the case stands thus: The plaintiff had made a bargain with *Goodacre* and *Buzzard* for the next presentation, and after that another bargain was made between *Goodacre* and *Buzzard* (with the assent of the plaintiff) and the defendant, whereby they agree, not to make a good title, but to sell the next presentation for the sum of 7,500*l.* to be paid on a certain day, on having such title as the vendors had received; with a covenant for a return of the money in a certain event, and an option to be exercised by the defendant as to 7000*l.* for his further security, but from which the 500*l.* was expressly exempted. This agreement was ratified by the plaintiff, who had before acquired an interest in the subject matter of this agreement, so that *Goodacre* and *Buzzard* could not without his assent make the contract with the defendant; consequently, there was a sufficient consideration for the promise to pay 500*l.* to the plaintiff. But it is contended that the vendors did not exhibit a good title, and did not tender any conveyance. If they did all that their contract required, and more was demanded, that exonerated them from the necessity of taking any further steps. Now I know not what language a man is to use who intends to sell such title as he has, and nothing more, if the words of the agreement in question will not suffice to limit his undertaking. If a purchaser unwisely bargains to pay for such title as another has, it is his own fault if his money is placed in hazard by the insufficiency of the title. Here, however, no hardship would be sustained, for the principal money was secured. There being

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being a sufficient consideration for the defendant's promise, and the vendors having done all that the contract required, the only remaining question is, whether the stipulation as to the assent of *Goodacre* and *Buzzard* imports that the consent was to be given at the time when the money was to be paid, or that it was given at the time of making the contract. I think it imports the latter, and that argument failing as well as the others, the plaintiff is entitled to the postea.

The other Judges concurring,

Postea to the plaintiff.

Friday,
May 18th.

DOE on the demise of the Rev. THOMAS MORGAN, Clerk, against JOHN MORGAN.

Real estates will pass under the word *property* in a will, unless there be other expressions to shew that it is used in a more confined sense; therefore, where a testator, after giving some pecuniary legacies, proceeded thus: "and all my property and effects of all claims I shall have, I give to my brother John; but my mother is at liberty to give 1000*l.* of my property where she pleases;" it was held, that the real estate passed to the brother.

EJECTMENT to recover certain lands and premises in the parish of *Llywell*, in the county of *Brecon*. The demise was laid on the 13th of *January 1826*. At the trial before *Garrow B.*, at the Summer assizes for the county of *Hereford*, 1826, a verdict was found for the defendant, subject to the opinion of this Court upon the following case:

Thomas Morgan, the lessor of the plaintiff, was the eldest brother and heir at law of *David Morgan* deceased. *David Morgan* being seised in fee of the premises in question, made his last will and testament in writing, bearing date the 3d day of *January 1822*, duly executed and attested to pass real estates as follows:

"*Jan.*

"Janv. 3rd 11822. In the name of God Amen.

as in the bond

"I give to W^m. 500 as intrest of £500 during his life to *Howell Jones* apprentice if he will wake a sober life with the secuirty of porson of the parish where he lives the sum of £5 p^r year. And all my property and effects of all claimes I shall have I give to my brother *John Morgan* of *Tull Glase* in *Cray* but my mother is at liberty to give £1000 of my property where she please. This is my last will by me,

" DAVID MORGAN."

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David Morgan, the testator, died before the 19th January 1826, without altering such will, being so seised and also possessed of personal property to the amount of 6000*l.* *John Morgan* the defendant, and *John Morgan* mentioned in the will, are the same person.

Campbell for the plaintiff. The real estate does not pass under this will. It is a general rule that the heir at law is not to be disinherited but by express words or necessary implication. There are no introductory words in this will to shew that the testator had any intention to dispose of his real estate. There is no mention of lands or of the heir at law. It is true that the real estate will pass in a will under the word *property*, or even under the words *personal property*, if that appear from other parts of the will to be the clear intention of the testator, *Doe v. Tofield* (*a*). On the other hand, the real estate will not pass under the words, "the residue of my estate, chattels, real and personal," the latter words explaining the former, *Markant v. Twisden* (*b*).

(a) 11 *Eas.*, 246.

(b) 1 *Eg. Cas. Abr.* 211.

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Here the word *property*, which is not a word of so comprehensive a meaning as the word *estate*, is followed immediately by the word "effects," which, *ex vi termini*, relates to personality. So where, after a devise of particular freehold lands, the testator gave all the residue of his estate, consisting in ready money, plate, &c., or in any other thing whatever or wheresoever, it was held, that the real estate would not pass by the latter words, *Timewell v. Perkins* (*a*). Nor will it pass by the words, "all the rest of my estate and effects, of what nature soever," *Doe v. Buckner* (*b*); nor, after a disposition of the real estate for life, under the words, "the residue of my effects wheresoever and whatsoever," *Camfield v. Gilbert* (*c*); nor, after a bequest of personal legacies, under the words, "all the remainder of my property, whatsoever and wheresoever," *Roe d. Helling v. Yeud* (*d*); nor under the words, "all other my property," following other words descriptive of personal property, *Doe v. Rout* (*e*); nor under a bequest of the residue of the estate to trustees upon trust to sell, *Doe v. Hurrell* (*f*); nor under a bequest of all and singular the testator's effects, unless, indeed, a contrary intent can be collected from other parts of the will, *Doe v. Dring* (*g*). It is true that in *Doe v. Tofield* (*h*) it was held that real property would pass under the description of *personal estates* in a will; but there it was manifest from the whole of the instrument that such was the devisor's intention; for there was a direct reference to that description in ulterior dispositions of the real estates.

(*a*) 2 *Aik.* 102.(*b*) 6 *T. R.* 610.(*c*) 3 *East*, 516.(*d*) 2 *N. R.* 214.(*e*) 7 *Townt.* 79.(*f*) 5 *B. & A.* 18.(*g*) 2 *M. & S.* 448.(*h*) 11 *East*, 246.

In

In *Doe d. Burkitt v. Chapman* (a) a devise of all the rest and residue of the testatrix's estate, of what nature or kind soever, was held to include real as well as personal property. But there also it was plainly the intention of the testatrix not to die intestate as to any part of her property, for she had surrendered her copyholds to the use of her will. In *Doe v. Lainchbury* (b) the real estate was held to pass under the words, "property and effects;" but it was manifest that the testator used those words to denote *real estate*; and upon that the judgment of Lord *Ellenborough* was founded. *Doe d. Wall v. Langlands* (c) is the strongest case against the plaintiff. There the real estate was held to pass under a bequest of "all and every the residue of property, goods, and chattels." But nothing appeared to restrain the meaning of the word "property," and the personal estate was not sufficient to pay debts and legacies. These authorities shew that, although the real estate may in some cases pass under the word "property," yet that it will not necessarily do so; and that it must be collected from the whole will whether the testator used that term to denote real as well as personal estate. Now there is nothing to shew that the testator in this case meant to devise his real estate. First, he gives two pecuniary legacies, one of 500*l.* and the other of an annuity to his apprentice; and then immediately following these pecuniary legacies there is a gift of "all his property and effects of all claims he should have" to his brother. Now the word *property* being coupled with the word *effects*, and following the pecuniary legacies, is evidently meant to denote the

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(a) 1 H. Bl. 223. (b) 11 East, 290. (c) 14 East, 370.

(b) 11 East, 290.

(c) 14 East, 370.

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personalty. But assuming that if this clause had stood by itself the real estate would have passed under the word *property*, there then comes a clause which shews that he did not suppose his real estate had passed by the former clause; for he directs that his mother should be at liberty to give 1000*l.* of his property where she pleased. The word *property* in this clause is used to denote part of the personal estate; and that raises a fair inference that it was used in the same sense in the former clause. If the personal estate at the time of the testator's death was not sufficient to discharge his debts, the mother could obtain the 1000*l.* only out of the real estate; but according to the construction contended for, he had already devised the real estate by the former clause. This clause, therefore, at all events, makes it very doubtful whether he intended to pass the real estate by the former clause, and if it be doubtful, then the rule of law applies that the heir at law is not to be disinherited, except by express words, or necessary implication.

Taunton contrà was stopped by the Court.

Lord TENTERDEN C. J. I am of opinion that the verdict in this case ought to be entered for the defendant. This is the will of a very unlettered person. I believe it is not unusual for such a person to use the word *property* to denote all that he has, real as well as personal estate. Our decision certainly ought not to be governed by that consideration. But it has been decided in many cases that in a will, the word "*property*" is of itself sufficient to pass real estate, unless there be something in the other parts of the will to shew clearly that

that

that word was used in a more confined sense. The only expression relied upon in this will to shew that the word *property* is used in a more limited sense, is that by which the testator directs that his mother was to be at liberty to give 1000*l.* of his property where she pleased. At the utmost that only makes it uncertain whether he intended that sum to be paid out of his real or out of his personal estate. The want of certainty in the latter clause, cannot take away from the language of the former the certainty which belongs to it. As the word *property*, *per se*, has been held to include real as well as personal estate, and as there is nothing in this will to shew that it is used in a more confined sense, I am of opinion that the real estate did pass by it. The judgment of the Court must, therefore, be for the defendant.

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BAYLEY J. Where an testator uses words calculated to pass the real estate, the real estate will pass by those words, unless it be shewn clearly from other expressions in the will that the words were used in a more confined sense. The word *effects prima facie* applies to personal property. But the word *estate* is sufficient to pass land. There may, however, be other parts of the will which shew that that word is confined to personal estate only. In one case, land was held to pass even under the words *personal estate*. In *Doe v. Langlands*(a) it was held, that the word *property* when used in a will would pass the real as well as the personal estate; and if there are other expressions in the will calculated to raise a judicial doubt only whether the testator intended

(a) 14 East, 370.

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to confine the word *property* to his *personal* estate, I think those expressions ought not to control the effect of the word *property*, which has been held to include the real as well as personal estate. Here the testator gives to his brother "all his property and effects of all claims he shall have," thereby meaning that all his property, and the produce of all his claims, should go to his brother. It is much the same thing as if he had said, "all I have, and all I am worth;" and it is quite clear that the real estate would have passed under those words. Then comes the clause by which the testator directs that his mother is to give 1000*l.* where she pleases. That may raise a judicial doubt whether the testator intended that sum to be paid out of the real or the personal estate; but I think that such a doubtful expression ought not to control the meaning of the prior clause, by which the testator bequeathed all his property to his brother. If there were no personal property, this bequest to the mother would enable her, in a court of equity, to charge the real estate, although it was devised to another.

HOLROYD J. The case of *Doe v. Langlands* (*a*), and the grounds on which it was decided, are conclusive in favour of the defendant. It is clear that the term *property*, *per se*, when used in a will, is sufficient to pass the real estate; and there is nothing in this case to shew that it is used in a different sense.

LITTLEDALE J. *Doe v. Dring* (*b*) shews that the word *effects* is not sufficient to pass the real estate; but

(*a*) 14 *Eas.*, 370.

(*b*) 2 *M. & S.* 448.

the

the word *property* is of itself sufficient to pass the real estate, and there is nothing in this case to shew that it is used in this will in any other than its ordinary sense.

Judgment for the defendant.

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against
MORGAN.

ARNSBY against WOODWARD.

Saturday,
May 19th.

ASSUMPSIT on a special agreement. The declaration stated that on the 31st of *May* 1824, it was agreed between the plaintiff and defendant that the former should purchase for 400*l.* a lease of certain premises theretofore granted by one *W. Yems* to *John Ellis*, and should accept the said lease or an underlease from *Farr and Newman*, to whom *Ellis* had agreed to underlet; that plaintiff deposited 90*l.*, which was to be forfeited if the purchase were not completed before the 24th of *June* then next, and that plaintiff was to have the lease with the same covenants that were contained in the lease granted to *Ellis*; that in pursuance of the agreement, plaintiff took possession of the premises, and was willing to perform the agreement in all things. Breach, that *Ellis*, before the making of the said agreement, had wholly vacated, annulled, and forfeited the said lease so granted to him by the said *W. Yems*, and the said term therein mentioned, together with the term for which *Ellis* had demised, or agreed to demise to *Farr and Newman*, had before that time thereby become and then was wholly ended and determined, whereby the plaintiff could not at any time after the making of the said agreement have, nor hath enter in order to take advantage of the forfeiture, and that he waived it by a subsequent receipt of rent.

Where a lease contained a proviso, "that if the rent should be in arrear for twenty-one days after demand made, or if any of the covenants should be broken, then the term thereby granted, or so much thereof as should be then unexpired, should cease, determine, and be wholly void, and it should be lawful to and for the landlord upon the demised premises wholly to re-enter, and the same to hold to his own use, and to expel the lessee;" Held, that this, in the event of a breach of covenant, made the lease voidable and not void, and that the landlord was bound to re-

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he had, the said lease so granted by the said *W. Yems* to *Ellis*, or an under lease from the said *Farr* and *Newman*, or any lease with the same covenants as in the lease granted by *Yems* to *Ellis*, as he ought to have been enabled by the defendant to have had. By means whereof plaintiff lost the 90*l.* deposited, and had to pay *Yems* the costs of an action of ejectment brought by him to recover possession of the premises, and sustained other special damage stated in the declaration. Plea, the general issue. At the trial before Lord *Tenterden C. J.*, at the *Westminster* sittings after last *Michaelmas* term, it appeared that in 1818 *Yems* had granted to *Ellis* a lease of the premises in question, containing various covenants, and, amongst others, a covenant not to assign without licence of the lessor; and a proviso, "that if the rent should be in arrear twenty-one days after demand made, or if any of the covenants should be broken, then the term thereby granted, or so much thereof as should be then to come and unexpired, should cease, determine, and be utterly void; and it should be lawful to and for *Yems*, and to and for the superior landlord of the said premises for the time being, into or upon the demised premises wholly to re-enter, and the same to hold to his own use, and to expel and amove *Ellis*." In 1820 *Ellis* entered into an agreement to underlet the premises to *Farr* and *Newman*; and the defendant, as their agent, entered into the agreement with the plaintiff set out in the declaration. In *June* 1824, plaintiff took possession of the premises, and in *July* *Yems* was willing to give *Ellis* a licence to assign to him; but the plaintiff insisted upon seeing *Yems*'s title, which was refused. At *Christmas* 1824, *Yems* received rent from the plaintiff; but that which became due at *Lady-*
day

day 1825 not having been paid, he brought ejectment, and delivered particulars of the breaches of covenant, for which he proceeded; viz. non-payment of rent due *Lady-day* 1825; not repairing and keeping the premises in repair at any period after the commencement of the term; not insuring from fire; not painting; assigning without leave: and keeping swine on the premises. The plaintiff gave notice of the ejectment and the particulars to the present defendant, who refused to interfere, and thereupon the plaintiff gave a cognovit, judgment was signed, and he was turned out of possession. The Lord Chief Justice was of opinion, that *Yems*, by receiving rent at *Christmas* 1824, had waived all the breaches of covenant committed before that time, and that for any subsequent breaches the defendant was not responsible; and that as *Yems* was at one time willing to allow *Ellis's* term to be assigned to the plaintiff, which he did not then choose to accept, he could not maintain this action; and his Lordship directed a nonsuit. In *Hilary* term a rule nisi for a new trial was obtained, against which

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Gurney and *Lawes* shewed cause. The only argument which the plaintiff can rely upon is, that by the breaches of covenant the lease granted to *Ellis* was absolutely void, and therefore could not be revived by the subsequent receipt of rent. But that is contrary to *Doe v. Bancks* (a), and *Read v. Farr* (b). Indeed, this case is not so strong, for here the proviso is, that "it shall be lawful for the landlord to re-enter:" in the cases cited

(a) 4 B. & A. 401.

(b) 6 M. & S. 121.

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it was, that "the lease should become absolutely void" in certain events.

The *Attorney-General* contra. Until the case of *Read v. Farr* was decided, it had always been considered that where a proviso made a lease void in certain events, entry by the landlord was not necessary in order to enforce the forfeiture. But in that case, and also in *Doe v. Bancks*, a distinction was taken in favour of the landlord; and it was held, that although the proviso declared that for certain breaches of covenant the lease should be void, yet the tenant should not be allowed to insist upon the forfeiture, because that would be taking advantage of his own wrongful act. It by no means follows, then, from those cases, that the landlord would not have been allowed to say that the lease was absolutely void. A distinction has been taken between the language of the proviso in the present case and in those referred to. But in this case the proviso is, that the term shall be *utterly void*, although it is added, "and it shall be lawful for the landlord to re-enter." Besides, it is part of the proviso, that the superior landlord may re-enter, and it does not appear that he has done any thing to waive the forfeiture.

Lord TENTERDEN C. J. I am of opinion that the nonsuit in this case was right. The ground of the plaintiff's action was, that the lease granted to *Ellis* had by his conduct become void. An ejectment having been brought against the plaintiff, he gave notice to the present defendant, who refused to interfere; whereupon *Arnsby* gave a cognovit, was turned out of possession, and had to pay costs, and lost the benefit of some expenditure

penditure which he had made on the premises. But if the then lessor of the plaintiff had no right to recover in the ejectment, on the ground of some forfeiture before *Arnsby* took possession, he cannot now turn round and claim damages from the defendant. It is said, however, that whether *Yems* could recover or not, still the superior landlord might. That forms no part of the injury alleged in the declaration, and I cannot upon the evidence in the cause discover that the superior landlord either could have recovered, or ever thought of proceeding. All the covenants made with him, had, for any thing that appeared, been duly performed, and, therefore, the question is merely this, — whether the lease to *Ellis* had become void. The proviso in this case is not precisely the same as in those cited; for here, after a statement that in certain events the term should cease, determine, and be utterly void, it is added, “and it shall be lawful to and for *Yems* to re-enter.” Taking those two clauses of the proviso together, the sound construction of them gives to the landlord a right to re-enter, to be exercised or not at his election; otherwise, the latter clause, “it shall be lawful to re-enter,” would have no effect. I think it may fairly be construed as if the two members of the sentence were transposed, and then there can be no doubt that a receipt of rent after the breach of covenant would be a waiver of the forfeiture. Supposing, however, this proviso had been in the very words found in the two cases that have been cited, I should still have thought that a receipt of rent by the landlord would be an admission that the lease was subsisting at the time when that rent became due, and that he could not afterwards insist upon a forfeiture previously committed. To hold the contrary might be productive of great injustice,

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for the effect would be this; it would enable a landlord at any period to eject a tenant after he had given him reason to suppose the forfeiture was waived, and after the latter had, upon that supposition, expended his money in improving the premises. For these reasons, I think that the rule for a new trial must be discharged.

BAYLEY J. I think that the receipt of rent by the landlord destroyed his right to proceed for any forfeiture alleged to have been committed before that time. The injury of which the present plaintiff complains has therefore arisen from his own neglect.

HOLROYD J. concurred.

LITTLEDALE J. In this case the lease was not void, but voidable; and the landlord was bound to re-enter in order to take advantage of the forfeiture, as in the case of freehold interests.

Rule discharged.

SAUNDERS against MUSGRAVE, Bart.

Where, in an agreement for the sale and assignment of certain promises, there was a stipulation "that in

A SSUMPSIT for money had and received. Plea, the general issue. At the trial before Lord *Tenterden* C.J. at the *Guildhall* sittings after last *Michaelmas* term, the following appeared to be the facts of the case.

the mean time, and until the assignment was made, the intended purchaser should pay and allow to the seller at the rate of 100*l.* per annum from the time of taking possession of the premises until the completion of the purchase; " the intended purchaser having taken possession, and one half-yearly payment having become due before the completion of the purchase: Held, that it was due as *rent*, and that the sheriff levying on the goods of the occupier under a *fi. fa.*, was bound by the 8 *Ann. c. 14.* to pay it over to the seller, as landlord.

In

In the month of *December* 1824, *Tucker* entered into a contract with *Mohun* for the sale of a term in certain premises at *Clifton*, and in consideration of 1260*l.* agreed to be paid to him by *Mohun*, he agreed that he would on payment of that sum at the request of *Mohun* execute to him an effectual assignment of the premises for the residue of a certain term of years then unexpired, and would on or before the 25th of *March* then next erect an additional room, and make certain other alterations, and put up certain fixtures; and in consideration thereof *Mohun* agreed to pay the 1260*l.* on or before the 21st of *December* 1825. And it was agreed that in the mean time and until the assignment was made, *Mohun* should pay and allow to *Tucker* at the rate of 100*l.* per annum from the time of taking possession of the premises until the completion of the purchase, in equal half-yearly payments; and *Tucker* agreed to furnish an abstract within three months. In *January* 1825, *Mohun* took possession of the premises, and continued in possession until *November* in the same year, when a writ of *fieri facias* issued against him at the suit of the present plaintiff for 150*l.*, and was delivered to the defendant, then sheriff of *Gloucestershire*. *Tucker* gave notice to the defendant that 75*l.* for three quarters of a year's rent, was due to him, and the defendant paid over to him out of the proceeds of the levy 50*l.* for half a year's rent. The remainder of the goods produced only 80*l.*, and this action was commenced against the sheriff to recover the sum of 50*l.* so paid over to *Tucker*. After *Mohun* took possession, *Tucker* agreed to allow him 12*l.* in lieu of some fixtures which were to have been put into the house, and in *February* 1825 *Mohun* paid *Tucker* in advance a

sum

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sum of 10*l.* *Tucker* never completed the repairs and alterations specified in the agreement. For the defendant it was contended, that the 100*l.* per annum which *Mohun* agreed to pay until the completion of the purchase was a rent; that one half year's rent was due at the time of the execution, and that consequently the sheriff was justified in paying over the 50*l.* For the plaintiff it was urged, that the 100*l.* was not a rent, and that at all events the plaintiff was entitled to a verdict for the two sums of 12*l.* and 10*l.* The Lord Chief Justice thought the plaintiff was entitled to the 50*l.*, and directed a verdict to be found in his favour for that sum, the defendant having leave to move to enter a nonsuit. A rule nisi for that purpose, or for reducing the verdict, was obtained in *Hilary* term; and now

Marryat and *F. Kelly* shewed cause. The principal question in this case relates to the 50*l.* paid over by the defendant as rent. That turns upon the construction of the contract entered into between *Tucker* and *Mohun*. Now that was a mere contract of purchase, a tenancy does not appear to have been contemplated. In *Dunk v. Hunter* (a), there was an agreement for a lease, with a clause of purchase, and yet it was held that there could be no distress for rent until a lease was executed, although the party had taken possession. Here the agreement was for the purchase only. It cannot be supposed that *Mohun* was to pay 100*l.* per annum if *Tucker* did not perform his agreement to repair and to improve the premises, or if he failed to furnish an abstract, and to do any act towards the completion of the

(a) 5 B. & A. 322.

bargain.

bargain. Again, the payment until the completion of the purchase was to be *at the rate* of 100*l.* per annum, and in *Parker v. Harris* (*a*), it was held, that a reservation of rent *at the rate* of 18*l.* per annum was bad. At all events the plaintiff is entitled to a verdict for 22*l.*, the amount of the 10*l.* actually paid, and the 12*l.* which *Tucker* had agreed to allow *Mohun*.

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Campbell contrà. The claim of the two sums of 10*l.* and 12*l.* was a complete surprise at the trial, admissions having been entered into in order to raise the general question as to the 50*l.* The 10*l.* was not shewn to have been paid as part of the rent, nor was the sum of 12*l.* to be considered as such a payment. They merely constituted items of account generally, and might have been set off as part-payment of the purchase-money of the premises. Then what was the relation between *Mohun* and *Tucker*? The former agreed, that from the time of taking possession he would pay *at the rate* of 100*l.* per annum by equal half-yearly payments. The legal estate was then in *Tucker* as landlord, and *Mohun*, by his permission, took possession at a fixed annual rent, payable at stated times. That surely constituted a demise. The agreement to repair was not a condition precedent to the payment of the rent, but if broken, would give *Mohun* a right to maintain a cross action.

Lord TENTERDEN C.J. I am of opinion that the relation of landlord and tenant at a fixed rent of 100*l.* per annum, payable half yearly, to commence from the time of taking possession of the premises, was created

(*a*) 1 *Salk.* 262. 4 *Mod.* 76.

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between *Mohun* and *Tucker*. Then as to the right to an abatement on account of the neglect to repair, I am satisfied by the argument for the defendant that the neglect has not given any right to an abatement from the rent, but merely to maintain a cross action. But it seems to me, that when *Tucker* agreed to allow 12*l.*, that meant that it should be allowed out of the first payment that became due, and I think the 10*l.* should also have been taken as part-payment of the half-year's rent. For those two sums the plaintiff is therefore entitled to a verdict.

Verdict reduced to 22*l.*

Tuesday,
May 22d.

BERRY against ADAMSON, Gent.

Where a sheriff's officer, to whom a warrant upon a writ against A. was delivered, sent a message to A., and asked him to fix a time to call and give bail, and A. accordingly fixed a time, attended, and gave bail : Held, that this was not an arrest, and that an action for a malicious arrest would not lie against the party suing out the writ, although he had no cause of action.

CASE for maliciously, and without probable cause, arresting plaintiff for an alleged debt of 90*l.*, and causing him to be kept in prison until he gave bail for his appearance at the return of the writ. Plea, not guilty. At the trial before Lord Tenterden C. J. at the Westminster sittings after last Michaelmas term, it appeared that the defendant, on the 29th of October 1825, issued an attachment of privilege against the present plaintiff, indorsed for bail for 90*l.* and upwards. The officer to whom the warrant was delivered sent his man to *Berry* with a message, that he had a writ against him, and requested that he would fix a time for attending at his (the officer's) house, and giving a bail-bond. *Berry* accordingly fixed a time, attended with two other persons, and executed a bail-bond. The officer's man did not take the warrant with him when he went to the plaintiff's

plaintiff's house. The cause was afterwards referred, and an award made in favour of the defendant. For the defendant it was objected, that this proceeding did not constitute an arrest; and *Arrowsmith v. Le Mesurier* (*a*) was cited, and upon the authority of that case the Lord Chief Justice directed a nonsuit. In *Hilary* term a rule nisi for setting aside the nonsuit was obtained; against which

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BERRY
against
ADAMSON.

The *Attorney-General* and *D. F. Jones* shewed cause. It is quite clear that in this case there was no actual arrest. The messenger who informed the plaintiff that there was a writ against him did not take the warrant with him, and afterwards the plaintiff attended voluntarily at the time appointed by himself, and executed a bail-bond. But it is said that a man may be virtually arrested although the officer does not lay hands upon him. That is certainly true; for if an officer desires a man to stay in a room, or locks the door upon him, that in law constitutes an arrest; but there must be either a corporal touch, or a capacity in the officer to arrest, and submission by the party, *Homer v. Battyn* (*b*), *Arrowsmith v. Le Mesurier*. Here there was nothing of the kind.

Brougham and *Chitty* contrà. The case of *Homer v. Battyn* is hardly distinguishable from the present, and shews that a detention by threat is in law an arrest. The present plaintiff, in consequence of a message from the officer that he had a writ against him, attended at the house of the officer and gave bail. The very act of

(*a*) 2 N. R. 211.

(*b*) Bull. N. P. 62.

1837.

Bailey
against
Arrowsmith

going to the officer's house was a submission to his arrest, and he could not then have gone away again without giving the bail-bond. After taking the bail-bond the sheriff was under the necessity of returning *exi corpore*, which proves that the law in such case considers an arrest as made. [*Bayley J.* "The sheriff might be estopped from denying the arrest, although the fact were otherwise."] The party who issues the writ should also be estopped. The case of *Arrowsmith v. Le Mesurier* was very different, for *Mansfield C. J.* held that there was nothing more than a summons in that case.

Lord TENTERDEN C. J. This was an action against the defendant, for arresting the plaintiff and keeping him in prison. Now, has he either actually or constructively been arrested and kept in prison? The case of *Arrowsmith v. Le Mesurier* shews that he has not. That case was much more favourable to the idea of a constructive arrest than this. There a constable went to the plaintiff with a warrant to arrest him on a charge of conspiracy, and exhibited the warrant, and afterwards the plaintiff accompanied the constable to the magistrate, and yet it was held that the warrant had been used only as a summons, and that there was no arrest. Here the officer's man did not take a warrant with him, nor did he tell the plaintiff that he came to arrest him, but merely gave notice of the writ, and asked him to fix a time for giving bail. I think, therefore, that the nonsuit was right.

HOLROYD and LITTLEDALE Js. concurred.

Rule discharged. (a)

(a) *Bayley J.* left the court during the argument.

1827.

FAYLE against BIRD.

*Tuesday,
May 22d.*

THIS was an action on a bill of exchange, dated 31st January 1826, drawn by the plaintiff on the defendant, requesting him, two months after the date thereof, *to pay to his the plaintiff's order, in London, 59l. 12s. 6d.* for value delivered the defendant in potter's clay; which bill the defendant, upon sight thereof, *accepted, payable at W. Mtcalf, Esquire, Coal Exchange, London.* The declaration averred presentment for payment at *W. Mtcalf, Esquire, Coal Exchange, London.* There were also counts for goods sold, &c. At the trial before Lord Tenterden C. J. at the *London* sittings after last *Trinity* term, the plaintiff failed in proving presentment in *London*, and was, therefore, nonsuited, but leave was given to move to enter a verdict for him. A rule nisi for that purpose having been obtained in this term,

A bill of exchange was drawn, payable at a particular place, and accepted payable there: Held, that this was a general acceptance within the meaning of the stat. 1 & 2 G. 4. c. 78., and that it was not necessary to prove presentment at that place.

F. Pollock shewed cause. The plaintiff was bound to prove a presentment of the bill in *London*. In *Rowe v. Young* (a) it was decided, that where an acceptance made a bill payable at a particular place, a presentment at that place was necessary to charge the acceptor, that being a limited, and not a general acceptance. To remedy the inconvenience resulting from this decision, the statute 1 & 2 G. 4. c. 78. was passed. The title of it is, "An act to regulate *acceptances* of bills of ex-

(a) 2 Brod. & B. 165.

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 against
 BIARD.

change." It recites, that it had been adjudged that where a bill is *accepted* payable at a banker's, the *acceptance* thereof is not a general but a qualified acceptance, and that mischief was likely to arise. It then enacts, "that an acceptance made payable at a banker's shall be deemed a general acceptance, unless accompanied with the words, "and not elsewhere." That statute, therefore, is clearly confined to cases where a bill is by the act of the acceptor made payable at a particular place. But in this case the bill is made payable in *London* by the act of the drawer. It is not, therefore, a case within the statute, and consequently presentment at the place mentioned in the bill was necessary. *Saunderson v. Bowes* (a), *Dickinson v. Bowes* (b), and *Howe v. Bowes* (c), are authorities to shew, that before the statute presentment to the acceptor in *London* would have been a condition precedent to the holder's having any claim against him.

Hutchinson contrà. The statute embraces all bills payable at a particular place, whether they are so made payable by the acceptor or the drawer. This very point was decided by the Court of Common Pleas in the case of *Selby v. Eden* (d), there a bill of exchange was drawn, payable to the order of the drawer in *London*, and accepted by the defendant at *London according to the usage and custom of merchants*. It was contended, that it was not a case within the statute 1 & 2 G. 4. c. 78. and that presentment in *London* ought to have been proved. But it was held after argument, that it was within the sta-

(a) *Bayley on Bills*, 175. 4th edit.(c) 16 *Eas*; 112.(b) 16 *Eas*, 110.(d) 3 *Bing*. 611.

tute, and that proof of presentment for payment in *London* was unnecessary.

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against
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Lord TENTERDEN C. J. I should certainly have entertained some doubt whether this case fell within the statute 1 & 2 G. 4. c. 78. had it not been for the authority cited on behalf of the plaintiff. It appears that the Court of Common Pleas in *Selby v. Eden*(a), have decided, that the act embraces every bill payable at a banker's or other place; and that there is no distinction between the case where the bill is rendered so payable by the language of the drawer, and the case where it is rendered so payable by the language of the acceptor. It is of great importance that there should be an uniformity of decision in the different Courts of *Westminster Hall* upon all questions, but particularly upon questions affecting negotiable instruments of this description. Upon the authority of that case, therefore, we are of opinion that the rule for entering a verdict for the plaintiff should be made absolute.

Rule absolute.

(a) 3 Bing. 611.

1827.

*Tuesday,
May 22d.*

ROPER against COOMBES.

Where *A.*, by agreement made on the 31st of March, agreed to grant to *B.* a lease of certain premises habendum from the 29th of September then next for twenty-one years, in consideration of 1000*l.*, of which 10*l.* was paid at the time of the agreement, 90*l.* was to be paid on the 15th of April, and the residue on having possession of the premises; and *B.* being called upon to pay the 90*l.*, demanded an abstract of *A.*'s title, which was refused, whereupon he gave notice that he would rescind the contract, and commenced an action to recover the 10*l.* which he had paid: Held, that he was entitled to recover, it being proved at the trial that at the time when the action was commenced *A.* had no power to grant the lease contracted for.

ASSUMPSIT for money had and received. Plea, the general issue. At the trial before Lord Tenterden C. J. at the Westminster sittings after last Michaelmas term, it appeared in evidence that on the 31st of March 1826 the defendant entered into an agreement to grant to the plaintiff a lease of a public-house, to hold for twenty-one years from the 29th of September then next, in consideration of 1000*l.*, of which 10*l.* was then paid down by the plaintiff: 90*l.* was to be paid on the 15th of April then next, and the residue on having possession. No time for granting the lease was expressly fixed by the agreement. The sum of 90*l.* was not paid on the 15th of April. On the 20th of that month the plaintiff by his attorney required the defendant to exhibit his title to the premises. The defendant, on the other hand, called for payment of the 90*l.*, and insisted that he was not bound to grant the lease, or to shew a title, until the 29th of September, and thereupon the plaintiff gave notice that he would rescind the contract, and called for repayment of the 10*l.* The defendant refused to repay it, and this action was commenced in Trinity term 1826. It appeared that the defendant had not at that time power to grant a lease according to his contract. For the defendant it was contended, that the action was brought too soon; that the contract did not bind the defendant to grant a lease before the 29th of September, and that until that time arrived, the plaintiff could not rescind the contract, for that the defendant might before that

that time obtain the power of granting such lease as he had agreed to sell to the plaintiff. The Lord Chief Justice thought that the plaintiff was entitled to rescind the contract, the defendant not having a right to grant the lease at the time when the title was demanded; and under his direction a verdict for the amount of the deposit was found for the plaintiff. In *Hilary* term a rule nisi for a new trial was granted; and now

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 Roper
against
Coomes.

The *Attorney-General* and *Dodd* shewed cause. The whole question depends upon the construction of the agreement. If it bound the defendant to grant a lease on request, or in a reasonable time, the plaintiff was clearly entitled to rescind the contract, the defendant having failed to complete his part of it, and not being in a condition to do so, *Bartlett v. Tuchin* (a). Now the agreement is altogether silent as to the time when the lease was to be granted: it merely provides that the term shall begin to run from the 29th of *September* then next. It is quite consistent that the lease should be granted before that time, for a part of the premium, amounting to 90*l.*, was to be paid in *April*, and it was but reasonable that the plaintiff before he paid so large a sum should have the means of knowing whether the defendant could make a title to the premises.

Gurney and *F. Kelly* contrà. The case of *Bartlett v. Tuchin* was between vendor and vendee. [Lord *Tenterden* C. J. Is not the contract in this case for the sale of a lease?] The plaintiff in this case had no right to call upon the defendant to grant the lease until the 29th of *September*, and, therefore, he could not before that time

(a) 6 *Term.* 259.

1827.

 Rorer
against
Coombes.

have a right to rescind the contract on the ground of any supposed want of title in the defendant. If he was in a condition to grant the lease on that day it was sufficient, *Thompson v. Miles* (*a*). At all events, therefore, the action was commenced too soon.

Lord TENTERDEN C. J. The sole question is, whether the plaintiff, at the time when the action was commenced, had a right to rescind the contract? If he had not, it follows that the defendant is entitled to maintain an action for the sum of 90*l.*, which was agreed to be paid on the 13th of *April*. The contract, on the part of the defendant, was to grant a lease on a future day not specified. The plaintiff having agreed to pay 90*l.* on the 13th of *April* did not do so; but on that sum being demanded, enquired what right the defendant had to grant the lease. It was but reasonable that the party should not pay so large a sum as 90*l.* without knowing that the defendant had power to complete his part of the contract. No evidence of his right was then given; and at the trial it was proved, on the contrary, that he had no such right at that time. Under such circumstances, I think that the plaintiff was entitled to rescind the contract, and to sue for the 10*l.* which he had paid.

HOLROYD J. I think that the defendant had no right to demand payment of the 90*l.*, and that the plaintiff may recover back the 10*l.* which he has paid. It has been held, that where a party has disabled himself from fulfilling a contract, although before the expiration of the time allowed for that purpose he may have re-

(*a*) 1 *Esp.* 184.

covered the means of doing so, still, in the mean time,
the other party has a right to rescind the contract.

1827.

ROPER
against
COOMBS.

LITTLEDALE J. concurred.

Rule discharged.

TRIMLEY against UNWIN.

Wednesday,
May 23d.

THIS was an action brought by the plaintiff as assignee of a bankrupt. The defendant gave notice that he intended to dispute *the bankruptcy*. At the trial before Bayley J., at the London sittings after last Michaelmas term, the plaintiff failed in proving an act of bankruptcy, and was thereupon nonsuited. In Hilary term a rule nisi for a new trial was granted, on the ground that the notice of the defendant's intention to dispute the bankruptcy was too general, and that, therefore, the plaintiff was not bound to give the evidence, for want of which he was nonsuited.

Where the defendant, in an action brought by the assignee of a bankrupt, intends to dispute the trading, petitioning creditor's debt, or act of bankruptcy, the 6 G. 4. c. 16. s. 90. requires him to give specific notice of his intention; and it will not suffice to give notice that he intends to dispute *the bankruptcy*.

Marryat was now heard against the rule, and

The Attorney-General in support of it.

Lord TENTERDEN C. J. It appears to me that the notice given in this case was insufficient. It stated generally that the defendant intended to dispute *the bankruptcy*. Now *bankruptcy* contains three terms, — the trading, petitioning creditor's debt, and act of bankruptcy; and the statute 6 G. 4. c. 16. s. 90. provides, that no proof of any of these matters shall be required, unless the party gives notice to the assignee that he intends

1827.

TAYMLEY
against
SWINN.

intends to dispute some or one of them. I think that the notice should specify which of these three matters it is intended to dispute, and that as the notice in question did not do so, it was too general. The rule for a new trial must therefore be made absolute; but it is reasonable that the defendant should have an opportunity of pleading *de novo*, and delivering a fresh notice.

Rule absolute on these terms.

FREE, D.D. *against* BURGOYNE.

The plaintiff in prohibition is not entitled to costs, except in cases provided for by the statute 8 & 9 H. 5. c. 11, s. 5.; and where the judgment on demurrer to a declaration in prohibition was, that a writ of prohibition issue as to proceeding on part of the matters contained in the libel, with a view to a particular object, and a writ of consultation as to proceeding upon them for any other purpose, and as to all other matters in the libel: Held, that this was not within the statute.

IN this case the Court gave judgment on demurrer to a declaration in prohibition, that a writ of prohibition should issue as to proceeding against the plaintiff for fornication or incontinence, for the purpose only of his soul's health, and the reformation of his manners; and that a writ of consultation should issue as to proceeding against the plaintiff for those offences, for the purpose of suspension or deprivation, or other punishment merely clerical, and also as to all other matters charged against the plaintiff in the libel in the court below. The judgment was completed, and a writ of consultation issued.(a) A writ of error was brought, which was still undetermined, the clerk of the errors having declined to make the transcript, because the judgment so completed on the roll had no award of costs. The plaintiff's attorney then took out an appointment to tax costs. The defendant's attorney contended against the liability to pay costs, and protested against the allowance thereof, on the ground that he had obtained a writ of consult-

(a) See 5 B. & C. 400.

ation

ation as to all the articles charged in the libel, though with a restriction as to the sentence; yet the officer of the court taxed, and allowed the plaintiff full costs. A rule nisi had been obtained for rescinding and striking out of the record the allowance of costs.

1827.

FREE
against
BUREAUX.

Denman now shewed cause. The words of the statute 8 & 9 W. 3. c. 11. s. 3. are, "that in all actions of debt upon the statute for not setting out tithe, &c., and in all suits upon any writ of scire facias, and suits upon prohibition, the plaintiff obtaining judgment, or any award of execution after plea pleaded or demurrer joined therein, shall likewise recover his costs of suit; and if the plaintiff shall become nonsuit, or suffer a discontinuance, or a verdict shall pass against him, the defendant shall recover his costs," &c. Now in this case the plaintiff in prohibition has obtained judgment after demurrer, and therefore he is entitled to costs within the very words of the statute. In *Middleton v. Croft* (a) the plaintiff obtained judgment as to one point, and as to all the other points of the suit the Court awarded a consultation; and on an application for costs the Court said that the words of the act which gave costs to the plaintiff, if he obtain any judgment, were not to be got over. It was further said, that the same point was under consideration in the House of Lords, in Dr. *Bentley's* case, where the prohibition stood as to some articles, and there went a consultation for the rest.

Marryat contrà. There was no judgment in this case for the plaintiff in prohibition, so as to prevent the de-

(a) 2 Str. 1056.

fendant

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FREE
against
BURGOYNE

fendant from proceeding in the ecclesiastical court, but he is at liberty now to proceed on every article of the libel for punishment in a qualified mode. In *Townsend v. Thorpe* (*a*), where a judgment similar to that pronounced in this case was given, the roll has been searched for, and found, and it appears that no judgment was entered on it. A partial prohibition and a partial consultation on the same articles is a *casus omissus* in the act. So a defendant in prohibition, who has judgment for him on demurrer, is not entitled to costs, because that case is not provided for by the act.

LORD TENTERDEN C. J. By the common law there were no costs in prohibition, and therefore, unless they are given in this case by statute, none can be awarded by the Court. We are inclined at present to think that this is not a case within the statute. We will make this rule absolute, but allow the plaintiff to amend his judgment by entering upon the record a prayer of costs, and a refusal of them by the Court, and also to assign that refusal of costs as a ground of error.

Rule absolute accordingly.

(*a*) *Ld. Raym.* 1507.

1827.

TOMKINS against ASHBY.

A SSUMPSIT on the money counts and account stated. Plea, the general issue. At the trial before Lord Tenterden C. J., at the *Guildhall* sittings after last *Michaelmas* term, the following memorandum, signed by the defendant, was offered in evidence on behalf of the plaintiff: "September 25th, 1824, Mr. Tomkins has left in my hands 200*l.*" This document was not stamped, and on that ground it was contended for the defendant that it could not be received in evidence. The Lord Chief Justice admitted it, and the plaintiff had a verdict for 200*l.* In *Hilary* term a rule nisi for entering a nonsuit was obtained; and now,

Plaintiff having deposited money in the hands of the defendant, received from him the following memorandum: "Mr. T. has left in my hands 200*l.*" In an action to recover that money, held, that the memorandum was admissible in evidence without a stamp.

Marryat shewed cause. In *Fisher v. Leslie* (a) it was held, that an I O U, being a mere acknowledgment of a debt, was admissible in evidence without a stamp. The memorandum in this case was nothing more than such an acknowledgment, it was not a receipt nor a promissory note, and there is nothing in the stamp act now in force, 55 G. 3. c. 184., which makes a stamp necessary for such an instrument.

The *Attorney-General*, contrà, contended that the memorandum ought to have had a receipt stamp. The stamp act exempts from duty "receipts given for money deposited in the Bank of *England* or Bank of *Scotland*,

(a) 1 *Esp.* 426.

or

1827.

TOMKINS
against
ASHBY.

or Royal Bank of *Scotland*, or in the Bank of the *British Linen Company* in *Scotland*, or in the hands of any banker or bankers, to be accounted for on demand." But for that exemption, such receipts would be liable to duty. The present defendant not being a banker, is not within the exemption, the memorandum was therefore improperly received in evidence.

Lord TENTERDEN C. J. I am of opinion that a stamp was not necessary in this case. Acts of parliament imposing duties are so to be construed as not to make any instruments liable to them unless manifestly within the intention of the legislature. Looking at the schedule of the 55 G. 3. c. 184., we find a duty imposed upon every "receipt or discharge given for or upon the payment of money." Then there is a declaration, that "any note or memorandum given to any person upon payment of money, whereby any sum of money, debt or demand, or any part of any debt or demand therein specified and amounting to 2*l.* and upwards, shall be acknowledged to have been paid, settled, balanced, or otherwise discharged, shall be deemed a receipt." All these words import that something formerly due has been discharged. I think, therefore, that the memorandum in question is not within the act, and does not stand in need of any exception. The exception, however, is relied on to shew that such instruments were within the contemplation of the legislature, but it is not surprising that the bank of *England*, and bankers in general, in order to remove all doubt, should be anxious to procure the insertion of that exemption. Inasmuch then as all the words in the act describing what shall be deemed a receipt apply to the discharge of money antecedently due,
and

and not to an acknowledgment that money has been deposited to be accounted for, I think that no stamp was, in this case, necessary, and that the rule for a non-suit must be discharged.

1827.

 TOMKINS
against
 ASHBY.

Rule discharged.

GLANVILL *against* STACEY.

Saturday,
May 26th.

THIS was an action of debt upon the statute of 2 & 3 Ed. 6. c. 13. for not duly setting out the tithes of barley and oats. Plea, nil debet. At the trial before Gaselee J., at the Summer assizes for Cornwall 1825, a verdict was found for the plaintiff for three shillings, subject to the opinion of this Court on the following case: In the year 1823 the plaintiff was farmer of the tithes of corn and grain in the parish of *Saint Germains*, in the county of *Cornwall*, and the defendant was then the occupier there of twenty-three acres of land tilled to barley, and of one acre of land tilled to oats. No composition for tithes existed between the parties.

The usual mode of harvesting and tithing of barley and oats in the parish was as follows. The crop is first cut by the scythe into swaths, which women and children then collect into sheaves by means of rakes; the sheaves are next bound and put into shocks consisting of eight, ten, or twelve each, and then the tithe immediately takes place. The portion of the crop which remains on the ground after this process, is then collected into rows with large rakes, and with small ones into bundles, which are called wads, and these are bound and placed together in heaps, and afterwards carried by the farmer to the mow.

Where a farmer pursued such a mode of harvesting barley, that a considerable quantity of raking were left scattered after the barley was bound into sheaves: Held, that tithe was payable in respect of these raking, although no actual fraud was imputed to the farmer, and he and his servants were careful to leave as little raking as possible in that mode of harvesting the crop.

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mow. After the carrying, there is generally some scattered corn left in the places of the heaps, and the whole field is then raked a second time as before. Both the first and second rakings are carried by the farmer to the mow, and treated as the rest of the crop. After the two rakings have taken place, and not before, the gleaners are admitted, and cattle, sheep, geese, &c. turned into the field. The average crop per acre through the parish, including both the tithe and what was collected by raking, was thirty bushels; and the average quantity of that which was left after the tithing took place was about three bushels, but the state of the weather, the length of the stalk, and the degree of skill and care exercised by the labourers, both in carrying the corn on the scythe, in mowing clean to the swath, and in raking clean for the binding of the sheaves, will make a considerable difference in the quantity left on the ground.

In the year 1823, the defendant followed the mode of harvesting above described, the tithe was set out before the rakings had been made into wads; but the tithe collector, who came with the plaintiff's waggons to take away the tithe, saw the quantity of the corn lying on the ground, and stated in evidence that, in his opinion, the quantity left would produce about three bushels per acre. The defendant was guilty of no fraud, and great care was taken by his directions in the mowing clean as aforesaid, and in raking clean for the binding of the sheaves, and as little rakings were left as possible in that mode of harvesting. The case was argued on a former day in this term by

Coleridge for the plaintiff. The only reasonable ground on which rakings can be exempted from the payment of tithes is, that the maxim *de minimis non curat*

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curat lex is applicable to them; and, therefore, wherever the quantity of rakings is considerable, and has been or can be reduced into a titheable shape, they must be titheable. There is certainly some contradiction in the cases upon this subject: most of them are in favour of the plaintiff; others are against him; but many of the latter are capable of explanation. In the earlier cases it appears to have been taken for granted that at common law rakings were subject to the payment of tithes; for wherever an exemption was claimed, that was always by prescription or custom, *Anon.* 29 Eliz. (a), *Bird v. Adams* (b), *Jesop v. Payne* (c), Sir C. Morrison's case (d), *Ledgar v. Langley* (e); and in many cases it was held that the prescription laid was void, and the tithe of rakings payable. Afterwards, in *Fosse v. Parker* (f), which was a suit for tithes of neck wool, *Houghton* J. observed, "There may be much deceit in this, as in the case of rakings: if purposely they will scatter corn, the parson shall have tithe of this, unless it be *minus voluntarie*." Again, in *Andrews v. Lane* (g), Richardson C. J. says, "As to rakings, I hold that where rakings are of great value, or if they are left on the land covinously, tithes shall be paid of them; but if they are left there in a small quantity, and involuntarily, it is otherwise, and therefore the words of the suggestion in such case are *minus voluntarie*;" and Croke J., as to rewine and rakings, and locks of wool, took the distinction made by the Chief Justice, for *de minimis non curat lex*; aliter, if in great quantities or by covin. In the present case it must be considered that the rakings were left *voluntarie*

(a) 2 Leon. 70.

(b) And. 199. Moore, 278. Sav. 100. S. C.

(c) Cro. Eliz. 363.

(d) Cited in *Gryman v. Lewes*, ib. 446.

(e) 1 Sid. 283.

(f) 3 Bulstr. 242. (g) 2 Gwill. 473.

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if the course of husbandry adopted were such that this consequence could not be avoided, although the farmer were not guilty of any fraud. In *Howard v. Bovington* (a), where the lessee of the rector sued for (amongst other things) tithe of the rakings of barley, it appeared that the course of husbandry was to mow the barley, and then put the swathe into cocks or wads with a fork, and to set out the tithe in the cocks without the rakings; and it was held that the plaintiff was entitled to have the corn scattered round the cocks raked up to the same before the tithe was set out; and yet in that case no fraud was imputed. So in *Filewood v. Kemp* (b) Lord Stowell said, "As to barley rakings, I have no hesitation in saying that I conceive the law to be, that the clergyman, being entitled to one tenth, is entitled also to the rakings of every tenth cock, as composing part of the proportion belonging to him." These cases are authorities in favour of the plaintiff, but there are others which at first sight bear a different aspect. In *Perry v. Some*, as reported by *Leonard* (c), it is said, "There was a case lately in this court betwixt the Lord *Howard* and *Nichols*, where the suit in the spiritual court was for the tithes of rakings, and the surmise for a prohibition was, that the inhabitants had used to till and sow their lands, &c., and they had used to be discharged of their tithes of rakings after that the shocks had been carried away; and *Coke*, who was of counsel with the parson, durst not demur upon it, but traversed the prescription." According to this account, it appears that the parties were considered liable but for the prescription. But in *Johnson v. Aubrey* (d) it is said, "*Coke* cited one *Nichols'*

(a) 4 Wood, 546.

(b) 1 Hagg. 487.

(c) Pl. 2. p. 27.

(d) Cro. Eliz. 660.

case to be adjudged in this court that tithes shall not be paid for rakes of corn unless it can be averred that they were foul rakes, and covinous to defraud the parson." That is probably the same case, and differs from the former report, by which it would seem that the prescription only was in question, and not the fraud of the farmer. *Green v. Hun* (*a*) is a stronger case against the plaintiff, where it was held that a prescription generally to pay the tenth cock of barley in satisfaction of the tithes of the barley and rakes, was good; and that if they were left *voluntarie*, that must be shewn by the other side. But in this case also the exemption was claimed by prescription. In *Pitt v. Harris* (*b*) it is said that a prohibition was granted, in a suit for tithes of rakes, and no special ground for it appears; but afterwards Serjeant *Finch* told the Court that the farmer made great gain of the rakes, and carried them to his barn; and *Coke* said, "The prohibition has been granted, but you may plead this if you will, to have a consultation." In several other cases it is said that rakes shall be exempt from tithe if there be no fraud, *Anon.* (*c*); in others that they are exempt unless left *voluntarie*, *Parry v. Chauncey* (*d*), case of modus decimandi (*e*), *Cecill v. Scott* (*f*); but none of these cases are inconsistent with a right to the tithe where the farmer chooses to adopt a course of husbandry by which a considerable quantity is necessarily left on the ground.

Carter contra. It is expressly stated in this case that the defendant was guilty of no fraud, and that great care

(*a*) *Cro. Eliz.* 702.

(*b*) *1 Roll. Rep.* 379.

(*c*) *1 Freem.* 384. *12 Mod.* 235.

(*d*) *Noy,* 15.

(*e*) *13 Co. 12.*

(*f*) *Litt. Rep.* 31.

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was taken, by his directions, in mowing and raking clean, and that as little rakings were left as possible in the mode of husbandry adopted, which was the usual mode in that part of the country; it is, therefore, impossible to say that these rakings were covinously or voluntarily left. In *Com. Dig. Dismes* (H), 1., it is laid down that no tithe ought to be paid for the rakings of corn where it is not dispersed by fraud; and, amongst other authorities, he cites *Pitt v. Harris* (a), 1 *Roll. Abr. Dismes* (Z), pl. 11., and 2 *Inst.* 652. The latter authority is Lord Coke's commentary on the 2 *Ed.* 6. c. 13., and when he is enumerating articles which by the common law are not tithable, he includes "rakings left without covin." And this agrees with and corroborates the case of modus decimandi. [*Bayley* J. In the case in 1 *Roll. Abr. Dismes* (Z), pl. 11., the reason of the exemption is said to be, that for rakings no tithes were due by the Levitical law. Now that was because they were left for the gleaner, whence we may conclude that the term *rakings* is properly applicable to that which is usually left for the gleaner, and not to that of which the farmer makes a profit.] No such limitation is put upon that word in any of the cases. Then, as to the class of cases where a prescription to be discharged of tithes of rakings was stated, it is quite clear that the prescription was not the ground of the discharge, it must have been at common law; for a prescription to pay tithe of part of the corn in satisfaction of tithe of the whole could not possibly be good; and this was so held in *Grysman v. Lewis* (b), and the result of all the cases is stated to the same effect in *Watson, Comp. Incumb.* 550. In *Erskine v. Ruffle* (c), Parker C. B., after noticing the

(a) 1 *Roll. Rep.* 379. (b) *Cro. Elk. 446.* (c) 3 *Gwill.* 961.
 case

case of *Green v. Hun*, as reported in *Cro. Eliz.*, says, " But the true reason of the judgment was, that no tithes were payable for involuntary rakings." So also in *Anon.*, 1 *Freeman*, 334., it was held that for rakings of corn no tithe was payable if they were involuntary, but if there were any *fraud* in leaving more than was necessary, *secus*. *Parry v. Chauncey* is also a direct authority that where rakings of corn are *minus voluntarie sparse* no tithe is payable in respect of them; and *Cecill v. Scott* is equally strong in favour of the defendant. All these cases appear to proceed upon a very reasonable ground, viz. that tithe shall be paid upon the crop cut and gathered according to the usual course of husbandry fairly and without fraud, and that for any trifling additional advantage which the farmer may gain by using extraordinary pains, he shall not pay tithe unless there were neglect, which in law may be deemed fraud, in harvesting the bulk of the crop. *Howard v. Bovingdon* was a very different case: there the corn was put up into cocks with a fork, and the scattered corn was raked up before the cocks were carried, but the farmer insisted upon a right to set out the tithe before the raking took place. In *Filewood v. Kemp* nothing is said as to the mode of harvesting; but the judgment raises an inference that it was similar to that stated in *Howard v. Bovingdon*.

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Cur. adv. vult.

Lord TENTERDEN on this day delivered the judgment of the Court.

This case was lately argued before us, and the several authorities bearing upon the question were quoted and commented upon at the bar. It is not necessary to go

O o 3 through

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through them again. They are very numerous, and not very consistent. The principle that may be extracted from them appears to be, that for small quantities, involuntarily left in the process of raking, tithe shall not be payable; otherwise, if there be any particular fraud or intention to deprive the parson of his full right. His right is to a tenth of the corn to be taken generally, when it comes to such a state or stage as that the parson may see he has his fair tenth. In the case now before the Court, particular fraud or deceit is negatived. The defendant is found to have followed the practice usual in the parish. But it is further found, that about thirty bushels of barley were collected by the first raking, and three bushels left on the ground, so that the tithe of the thirty being set out, the parson would have an eleventh part only, and not a tenth, and this, although great care was taken in mowing and raking clean for the binding of the sheaves. And we are of opinion that a course of harvesting, by which so large a portion is not subjected to the tithing, even when great care is taken, and by which, consequently, a much larger portion may be withdrawn, if the process be less carefully conducted, operates in itself as a deceit, and cannot be sustained at law, and, consequently, that the plaintiff was certainly entitled to the tithe of what was left after the first raking. The quantity left at the second raking was probably too small to be worth attention.

The verdict, therefore, is to stand, and the postea to be delivered to the plaintiff.

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STONE and Another *against* W. MARSH, J. H.
STRACEY, and G. E. GRAHAM.

THIS was an issue directed by the Lord Chancellor to try whether the defendants and one *Henry Fauntleroy* were, at the date and issuing forth of certain commissions of bankrupt against the defendants and *H. Fauntleroy*, indebted to the plaintiffs and *H. Fauntleroy* in any and what sum of money, his Lordship having ordered that on the trial of that issue no objection should be taken to the proceeding to the final determination of the said issue, on the ground that *Fauntleroy* was interested as a trustee jointly with the plaintiffs, and also a partner with the defendants. At the trial before Lord *Tenterden C. J.* at the *London* sittings after *Hilary term 1826*, a verdict was found for the plaintiffs, subject to the opinion of this Court on the following case:

On the 26th day of *May 1819*, there was standing in the books of the Governor and Company of the Bank of *England*, in the name of the plaintiffs jointly with *H. Fauntleroy* deceased, the sum of *17,061l. 12s. 4d.* in the capital stock of *Navy 5 per Cent. Annuities*, which were held by the plaintiffs and *Fauntleroy* as trustees under the will of Sir *Thomas Bemers Plaistow* deceased. The defendants and *Fauntleroy*, and Sir *J. Sibbald, bart.*, until the death of Sir *J. Sibbald*, and the defendants and *Fauntleroy*, since the death of Sir *J. Sibbald*, carried on the business of bankers in *Berners-Street*, under the firm of *Marsh and Co.* On the 25th of *May 1819* instructions were given by the house of *Marsh and Co.*

A. B. and C.
were proprietors
of stock as trus-
tees, and C. D.
and E. were
bankers. C.
executed a let-
ter of attorney,
empowering D.
and E. to sell
the stock, and
forged the sig-
nature of A.
and B. The
stock was sold
and transferred
in the books of
the Bank of
England, to the
credit of the
buyers, and the
produce of the
stock was paid
into the bank-
ing-house of
C. D. and E.
C. was after-
wards tried and
convicted of
forging a si-
milar instru-
ment, and ex-
ecuted: Held,
upon an issue
directed by the
Lord Chan-
cellor (it being
part of the
order that no
objection
should be taken
that he was in-
terested as a
trustee, and a
partner in the
banking-
house, that the
money received
by the banking
house consti-
tuted a debt due
from them to
the trustees.

to their broker *J. H. Spurling*, to sell as much of the said stock as would produce 16,000*l.* sterling; previously to which time there had been lodged at the Bank of *England* a letter of attorney purporting to be executed by the plaintiffs and *Fauntleroy*, to sell, assign, and transfer all or any part of 16,000*l.* part of the said annuities, which letter of attorney was executed by *Fauntleroy*; but the execution thereof by the plaintiff was forged by *Fauntleroy*. Pursuant to such instructions, *Spurling* entered into contracts with various stock-jobbers for the sale to them of 15,811*l.* 18*s.* of the said Navy 5 per Cent. Annuities, at prices which upon the whole yielded 16,019*l.* 15*s.* 4*d.*, the 1*l.* 15*s.* 4*d.* being the amount of the brokerage. On the 26th May 1819, *J. H. Spurling* caused transfers to be prepared in the books of the Governor and Company of the Bank of *England*, of part of the said annuities to the amount of 7000*l.*, to the purchasers thereof or their nominees; and on that day the defendant *J. H. Stracey* attended at the Bank and signed the demand to act indorsed on the said power of attorney, and then executed two several instruments of transfer so prepared in the books kept at the Bank of *England*, of two sums, part of the annuities, viz. 6895*l.* 10*s.* 6*d.*, to the Rev. *W. Yates* and *T. Norris*, Esq., and 104*l.* 9*s.* 6*d.* to one *Henry Neil*; and the annuities were thereupon carried by the Governor and Company to the credit of the said transferees in the books kept at the Bank of *England* for transfer thereof, and the plaintiffs and *Fauntleroy* ceased to have credit for the same in the said books kept at the Bank. On the 28th day of *May* 1819, the residue of the annuities was in like manner transferred to the purchasers, the instruments of transfer having been executed by *Graham*, and

and the annuities were thereupon carried by the said Governor and Company to the credit of the transferees in the books kept at the Bank of *England* for transfer thereof, and the plaintiffs and *Fauntleroy* ceased to have credit for the same in the said books kept at the Bank. The defendants' house had an account with Messrs. *Martin, Stone, and Co.*, bankers in the city, in the usual way of a banker's account; and a pass-book went from one house to the other from time to time, according to the usual practice between bankers and their customers; and to this account *Spurling*, the broker, usually paid the money received by him for stock sold by order of the defendants' house. The consideration-money of the annuities was received by *Spurling*, and was paid by him to *Martin, Stone, and Co.*, to the credit of the house of *Marsh and Co.*, according to the usual practice, together with the sum of 9*l.* 17*s.* 8*d.*, one moiety of the broker's commission, which was allowed by him to the house of *Marsh and Co.*, according to the usual practice on sales effected by him on their account; since which payment the account of *Marsh and Co.* with *Martin and Co.* had been frequently balanced before the bankruptcy. *Fauntleroy* was permitted by the partners to conduct the greater part of the business of the house without their interference, and drew upon the account at *Martin, Stone, and Co.*'s in the partnership firm (as he thought fit), without the knowledge and in fraud of his partners, more than the amount of the said sums so paid in.

Upon the apprehension of *Fauntleroy*, shortly before the bankruptcy, a paper was found in his private desk, whereof he kept the key, in the hand-writing of the defendant *Graham*, in pencil, of which the following is a copy:—

" 26th

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against
Marsh

CASES IN EASTER TERM

2327.

~~Decr
1819
M. 1819~~

" 26th May 1819. £15,000 odd, Navy dues.
" 7105 paid into Martin's on the 26th, and on the 28th, 8900 odd, to make up the account to raise 16,000, money of H. F. Gahagan and Stone."

There was no account with the defendants' house in the names of the plaintiffs and *Fawciley*, but there was an account in the names of the executors of Sir Thomas Plaistow. The executors were, in fact, the plaintiff, Gahagan, Messrs. Plaistow and *Fawciley*. The defendant, *Stracey*, knew that the plaintiff, *Stone*, was in India in the year 1819. The money raised by the transfers was not carried to the executors' account. A broker's note of the sale was transmitted by the said J. H. Spurling to the house of *Marsh* and Co., in the usual course.

Bosanquet Serjt. for the plaintiffs. The money produced by the sale of the stock and received by the banking-house constituted a debt due from them to the plaintiffs. The case may be considered, first, independently of the forgery; secondly, as connected with it. First, taking the question independently of the forgery, this was money had and received by the banking-house of the defendants to the use of the trustees. The contract for the sale of stock belonging to the plaintiffs was made by the defendants through their broker. It was sold to an innocent party, and the price was received by the broker, and paid into the house of *Stone* and Co., together with half the brokerage to the credit of the defendants' house, and afterwards drawn out upon cheques drawn in the name of their firm. The money so received by the banking-house not having been paid over

over to the trustees, clearly constitutes a debt due to them. It may be said that the stock was transferred, and the money paid to the defendants without the authority of the trustees. The purchaser, however, does not object to the conveyance or claim to have his money back, the defendants, therefore, can have no plea for retaining it from the plaintiffs. *Marsh* and Co. assumed to have authority to sell the stock; they sold it, and received the money: the former owners of the stock may adopt their act and claim the money, for the defendants cannot be permitted to say they had not authority; and the principal has a right to adopt and to have the benefit of the acts of a person assuming to have the authority of an agent, at all events as against such agent, *Routh v. Thompson* (a), *Lucena v. Crawfurd* (b), *Hagedorn v. Oliverson* (c). The fraud of *Fauntleroy*, in giving authority to act without the consent of his co-trustees, is no part of their title. They do not claim through the forgery, for their title is equally valid whether the authority to transfer was good or not. Suppose there had been no apparent authority, but that it had been assumed by the banking-house, could they retain the money? A fraud has been committed, but it was for the benefit, not of the trustees, but of the banking-house. The object of it was, to obtain money on the stock of the trustees, and thereby to increase the funds of the banking-house, upon which *Fauntleroy* was authorised to draw in the name of the firm. If the partners are defrauded, it has been through their own fault, and the confidence which they placed in *Fauntleroy* with a view to their own benefit. Such fraud cannot affect the right of the

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(a) 13 East, 285. (b) 2 N. R. 325. (c) 2 M. & S. 485.

trustees

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trustees to insist on their debt. Besides, no man can take advantage of the fraud of another to his own profit. Independently of the felony, therefore, there is nothing to prevent the plaintiffs from recovering. Then, to consider the case as connected with the felony, does the fact of the power of attorney, (which authorised the transfer,) having been forged by one of the partners in the banking-house, affect the plaintiffs' right to recover? That power of attorney is not the foundation of the plaintiffs' claim, but the receipt of the money by the banking-house. The transfer was not a felony nor an indictable offence, nor the payment of the money by the buyer, nor the receipt of it by the defendants. Besides, a person is not deprived of a civil remedy because his property has been taken from him by means of a felonious act. If goods in the possession of a carrier or innkeeper are feloniously stolen, the owner may recover the value. So goods stolen may be recovered against a purchaser, unless they be bought in market overt. So if a bank note be stolen, the owner may bring an action against the holder of it, and recover, if the latter has not used due diligence. In *Willet v. Chambers*(a), *Dadley*, in 1771, obtained from one *Bindley* 350*l.* by forging a mortgage to him from one *Hughes*. In 1776 *Dadley* and *Chambers* became partners. Then *Bindley* wishing to call in his money, *Dadley* agreed with *Willet* to procure him a mortgage for 500*l.*, being 150*l.* in addition to the 350*l.* An assignment of the pretended mortgage was made to *Willet*, who paid 180*l.* to *Chambers* and 300*l.* to *Dadley*. *Dadley* died, *Chambers* was not privy to the forgeries, and no procuration money was paid. Yet, although *Willet's* money was obtained

(a) *Couper*, 814.

by

by forgery, he recovered against *Chambers* the whole 480*l.* Suppose one of the partners in a banking-house to forge the indorsement of a payee of a bill of exchange, and then to indorse the bill in the name of the firm, could it be contended that the forgery of the name of the payee would afford any defence to the house in an action on the bill, especially if the partner were dead? It is an incorrect expression to say, that a debt or trespass is merged in a felony. The felon cannot be sued for the debt or trespass for a time, but the right of action is not gone for ever. The rule, that a party injured by a felonious act cannot sue the felon, is founded on principles of public policy. The object of it is, to secure the punishment of offenders. But if the offender is dead, or has been brought to trial, the case does not fall within the reasons on which the rule is founded; and then the maxim applies, *cessante ratione cessat et ipsa lex.* The civil remedy against the felon is only suspended until the party has been tried for the felony. When that has taken place, and he has been either acquitted or convicted, an action for the civil injury resulting from his wrongful act is maintainable. In *Bro. Abr. Trespass*, pl. 415., it is said to have been agreed that if a man be indicted, arraigned, and *acquitted* of the robbery of *J. S.*, he shall not have an action of trespass, for the trespass is *extinct* in the felony, *et omne maius trahit ad se minus*; but a *quære* is added, and this cannot be law to the extent of the terms in which it is stated, for the acquittal may have proceeded on the ground that the offence charged did not amount to felony. But the question arose, as it appears from the Year-book 31 H. 6. 15., upon a writ of conspiracy for indicting the plaintiff of an assault and battery, and stealing from his person feloniously 4*s.* The objection

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jection to the writ was, that it comprehended assault and battery as well as robbery, for which former the writ of conspiracy did not lie; and the Court appear to have thought that they made part of the felony; and that being acquitted of the felony, he was acquitted of the trespass. In *Higgin's* case, cited by *Roll C. J.* in *Dawkes v. Coveneigh* (*a*), trespass was brought by the husband for beating his wife, whereof she died, it was held that the action did not lie, because it was felony. But in that case the offender (the defendant in the action) was alive, and did not appear to have been indicted. In *Markham v. Cobb* (*b*), *Doddridge* and *Whitlock Justices*, (against *Jones J.*) held that trespass for breaking the plaintiff's house and stealing his money lay after a conviction of the defendant for burglary and felony. [Lord *Tenterden C. J.* That is not a very intelligible case.] The judgment of the Court in *Dawkes v. Coveneigh* (*c*), *Lord Hale's Treatise on the Pleas of the Crown*, p. 546., and a dictum of *Buller J.* in *Master v. Miller* (*d*), all shew that the rule against maintaining a civil action for an act which amounts to a felony is founded upon principles of public policy, and does not extend to cases where those principles would not be violated by suffering the action to be maintained; and all these authorities were considered and confirmed in *Crosby v. Leng* (*e*). There is no pretence for imputing collusion to the present plaintiffs; for it is not yet known in what county *Fauntleroy* forged the power, so that it was impossible to convict him of the forgery. He could not have been tried for uttering the forged instrument. No one now knows how the power was left at the Bank of *England*:

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(a) *Styles*, 347. *Yelv.* 89.(b) *Noy*, 82.(c) *Styles*, 547.(d) *4 T. R.* 332.(e) *12 East*, 409.

it might have been by himself, by an innocent or a guilty agent. If by an innocent agent, it was an uttering by *Fauntleroy* at the Bank of *England*; if by a guilty agent, the delivery to him was an uttering. The plaintiffs not being able to discover any evidence as to that point, could not prosecute with effect; they cannot, therefore, be charged with fraud or collusion.

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F. Pollock contrà. There is no debt at law due from the banking-house to the trustees. The case may be considered in three ways. First, considering *Fauntleroy* as a trustee, but not a partner in the banking-house; secondly, as a partner, but not a trustee; thirdly, as both a partner and a trustee. First, considering *Fauntleroy* not as a partner in the banking-house, but as a trustee, he must then be taken to have employed the bank, and to have sold the stock through their agency, and to have paid the money to them on his own account, and to have received it back again. That is the substance of the transaction. He has, in some form or other, paid the money in, and he has drawn the money out. In this case the defendants may have known that it was not his own; still, if it was paid to his private account and drawn out by him, they cannot be answerable to his co-trustees. On the first supposition, therefore, the bankers are not liable. The half commission was relied upon as shewing that the bankers interfered in the sale, and are, therefore, liable; but bankers take half of the brokerage in every case where for a customer they employ a broker; and, therefore, no conclusion adverse to the defendants can be drawn from this fact. Secondly, suppose *Fauntlcroy* to have been a partner in the banking-house, but not a trustee, and that he brings the power

of

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of attorney and puts the money to his own account, and then draws it out, his co-partners would not be answerable. In *Smith v. Robert and Thomas Jameson* (*a*), one of the two partners applied trust-money in the trade with the privity of the other partner; afterwards they separated, and the partner's effects were assigned over to the first, who took on him the debts. This was held to be no payment in discharge of the other partner, but both were liable to make good the trust-money. That case is distinguishable from the present, because *Smith*, by being made sole assignee, was invested with the title ab initio, and *Thomas* knew that *Robert* broke his trust when he applied the money to the partnership use. Then to consider *Fauntleroy* both as a trustee and a partner; how can the blending of the two characters make the partners liable if they would not be so, taking *Fauntleroy* as acting in either character separately? The money certainly has got among the funds of the house, but the same person, the same hand that paid it in, has withdrawn it; then what claim can there be against the other partners who were unconscious of either the paying in of the money or the taking out of the money?

Then as to the felony, it must be conceded, according to the authorities cited, that after conviction of the felon an action may be maintained against him. But the transaction in this case is wholly void. The plaintiffs cannot adopt a felony. Their remedy is against the persons who have the stock, or against the Bank of *England*. The statute 24 G. 3. c. 39. s. 14. requires transfers to be entered and registered, signed by the party or attorney lawfully authorised. The transfer in

(a) 5 T. R. 601.

this

this case was not so made. In *Davis v. The Bank of England* (*a*) it was decided by the Court of Common Pleas, that property in stock is not transferred from the owner by being placed, under a forged power of attorney, to the name of another person in the books of the Bank of *England*. The plaintiffs, therefore, need not resort to the banking-house. Suppose the money of *A.* to be drawn out of the hands of his banker *B.* by a forged check, and paid to *C.*, another banker, and then *B.* to become bankrupt; the assignees of *B.*, and not *A.*, will be entitled to the money from *C.* If any person can sue here, it must be the Bank of *England*. A man cannot adopt a felony. An assent to a battery formerly done, or to a tort punishable by statute, as an assent to a riot or forcible entry after it be done, shall not make a man punishable, *Vin. Abr.*, tit. *Ratihabitio*, *Bishop v. Lady Montague* (*b*). In *Co. Litt.* 295 *b*, it is laid down, that confirmation cannot work on a void act. In point of law, therefore, no stock has been transferred, and the trustees are still possessed of the stock, though it may not stand in their names; for the transfer is void, and with respect to any adoption, it seems clear that the other trustees cannot adopt or confirm a felonious act; for that only can be adopted afterwards which might have been commanded before.

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Cur. adv. vult.

LORD TENTERDEN C. J. now delivered the judgment of the Court, and, after stating the facts of the case, proceeded as follows:

The defendants in this case are by the order of the Lord Chancellor prevented from taking any objection

(*a*) 2 *Bing.* 593.

(*b*) *Cre. Ells.* 824.

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on account of the particular situation of *H. Fauntleroy*, as being both a proprietor of the stock sold, and a partner in the banking-house; and the case is, therefore, to be considered as a case between the plaintiffs, proprietors of navy 5 per cent annuities, on the one part, and the defendants, as a banking-house, on the other part. And it appears, by the case, that the defendants' house, by means of sales of the annuities made under the orders of the house, and transfers signed part by one of the defendants, and part by another, received the price and proceeds of the annuities; that the money was paid by the broker, who effected the sales, into the defendant's house by a payment to their agents in the city; that it was so paid generally, and was never appropriated by the house to any particular account; not to the account of *H. Fauntleroy*, as was assumed in one part of the argument for the defendants, nor to the account of the trustees, who had not, in fact, any account with the house, nor to the account of the executors of the person, of whose estate these annuities had formed a part, and who had an account with the house; and, therefore, being so paid in, and not placed to any particular account, cannot have been drawn out, but must be taken to have remained in the hands of the house at the time of the bankruptcy. Upon this state of facts it cannot be doubted that it was the duty of the house to place the money to the credit of the trustees, and retain it for their use, and subject to their order; and that no ignorance on the part of any of them, even supposing all but one to have been ignorant of the facts (which, however, cannot have been), nor any neglect on the part of the house, arising from a misplaced confidence reposed by them in one of themselves, or otherwise, to which

which the plaintiffs were no parties, can deprive the plaintiffs of their right to their money. And these facts were all that it was incumbent on the plaintiffs to prove in order to shew their right to the money. It was not necessary for them to shew that the sale of the annuities was made with their authority; for even if made without their authority, and by an act wrongful toward them, they might by law waive the wrong, and demand the money, as is done in many other cases.

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The other facts stated in the case, of which one alone is of any importance, are brought forward on the part of the defendants; and it remains to be considered whether that fact defeats the plaintiffs' claim. That fact is, that the transfers were made under a forged power of attorney, forged by *H. Faundleroy*, a member of the defendants' house. The authority was forged *by* and not *to* him; the *instrument* does not profess to give him any authority to sell the annuities; the authority is expressed to be given to the other members of the house jointly and severally, and could only be executed by some of them, as, in fact, it was. They ought to have satisfied themselves of the validity of the authority before they acted upon it. This forgery was a capital felony; and it is, therefore, urged on behalf of the defendants that there has been no valid transfer of the annuities; that the Bank of *England* is answerable to the plaintiffs for having permitted the transfers to have been made without their authority; and that the buyers are also answerable as having taken by purchase from persons who had no authority to sell. It is not necessary to say whether the plaintiffs had or had not these remedies, or either of them, because, generally speaking, where an injured party has different remedies against different persons, he may elect which he will

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pursue. So that the question is, Whether the plaintiffs have the remedy they now seek? The transfers were made, and the money received, in pursuance of a felony committed by a member of the defendants' house. Can the house set up this felony as an answer to the plaintiffs' claim? In general a man cannot defend himself against a demand, by shewing on his part that it arose out of his own misconduct, according to the maxim, " *Nemo allegans suam turpitudinem est audiendus.*" There is, indeed, another rule of the law of *England*, viz. that a man shall not be allowed to make a felony the foundation of a civil action: not that he shall not maintain a civil action to recover from a third and innocent person that which has been feloniously taken from him; for this he may do if there has not been a sale in market overt; but that he shall not sue the felon; and it may be admitted that he shall not sue others, together with the felon, in a proceeding to which the felon is a necessary party, and wherein his claim appears, by his own shewing, to be founded on the felony of the defendant, *Gibson v. Minet* (a). This is the whole extent of the rule. The rule is founded on a principle of public policy; and where the public policy ceases to operate, the rule shall cease also. This point was very ably shewn in the argument on the behalf of the plaintiffs. The authorities were quoted, and need not be repeated; and it was shewn that the familiar phrase, "the action is merged in the felony," is not at all times and literally true. Now public policy requires that offenders against the law shall be brought to justice, and for that reason a man is not permitted to abstain from prosecuting an offender, by receiving back stolen property, or any equivalent or composition for a felony,

(a) 1 *H. Bla.* 612.

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without suit, and, of course, cannot be allowed to maintain a suit for such a purpose. But it is not contended that any such policy or rule is applicable to the present case: the offender has suffered the extreme sentence of the law for another offence of the same kind. It does not appear that the plaintiffs had any knowledge of the particular forgery mentioned in this case, at such a time as might have enabled them to bring the offender to justice sooner; or even if they had been acquainted with the fact of the forgery, that they could, in ignorance of the place of the forgery, and of the means by which the forged instrument was placed in the Bank of *England*, have instituted a prosecution with success. And it was very properly admitted, by the learned counsel for the defendants, that he could not contend that an action might not be maintained after conviction of the felon. But it was contended that the maxim of ratifying a precedent unauthorized act, and taking the benefit of it, cannot apply to a void or to a felonious act; and that here the plaintiffs were seeking to ratify the felonious act of *H. F.*, and were making that act the ground of their demand. In this latter assertion lies the fallacy of the defendants' argument. The assertion is incorrect, in fact; the plaintiffs do not seek to ratify the felonious act; they do not make that act the ground of their demand. The ground of their demand is the actual receipt of the money produced by the sale and transfer of their annuities. The sale was not a felonious act, neither was the transfer, nor the receipt of the money. The felonious act was antecedent to all these, and was complete without them, and was only the inducement to the Bank of *England* to allow the transfer to be made. If public policy had required that the felonious inducement should

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prevent a claim to the money afterwards received, as it would do if an action were brought against the felon for the money received by a transfer obtained by his felony, in lieu of a prosecution for the felony, a defence of another kind would be given. But that is not the present case, and not being so, we think the plaintiffs may entirely pass by the felony, and rely on the transfer and receipt of the money, and that the defendants cannot protect themselves against the demand for the money which they have received, by shewing this felony on the part of one of the members of their house. The postea, therefore, is to be delivered to the plaintiffs.

Postea to the plaintiffs.

*Saturday,
May 26th.*

The KING *against* RUSSELL and Others.

Upon the trial of an indictment for a nuisance in a navigable river, by erecting staiths there for loading ships with coals, the jury were directed by the learned Judge to acquit the defendants if they thought that the abridgement of the right of passage occasioned by these erections was for a public purpose, and produced a public benefit,

INDICTMENT for a nuisance in the river *Tyne*. The first count alleged that the river *Tyne* was, and from time immemorial had been, an ancient river, and the king's ancient, common, and public highway, for all the liege subjects of the king and his predecessors, with their ships, keels, lighters, cobles, boats, wherries, and other vessels, to navigate, sail, row, put, set, pass, and repass, without obstruction; and that the defendants on, &c., and from thence until the taking of that inquisition, did unlawfully keep and continue certain geers, spouts, piles, posts, waggon-ways, rail-ways, platforms, and erections, that is to say, ten geers, &c., which before then had been unlawfully, &c. erected, and if the erections were in a reasonable situation, and a reasonable space was left for the passage of vessels on the river; and he pointed out to the jury that by means of the staiths coals were supplied at a cheaper rate, and in better condition, than they otherwise could be, which was a public benefit: Held, by *Bayley* and *Holroyd* J.s., that this direction to the jury was proper. Lord *Tenterden* C. J. diss.

placed,

placed, fixed, put, and set in, upon, and over the said river and king's ancient, common, and public highway, near to a certain place called *Wallsend*, and which had been and were erected, &c. upon and over the said river to a great extent, to wit, to the extent of 300 feet, towards the middle of the stream, by means whereof the navigation, course, stream, and passage of, in, through, along, and upon the said river, and the king's ancient, common, and public highway thereon, &c., and from thence continually up to that time had been and still were greatly straitened, narrowed, lessened, obstructed, and blocked up, and whereby divers large quantities of coals, stones, gravel, sand, soil, silt, mud, and other substances became and were collected near to the said place where the said geers, &c. were placed, and in other parts of the river, and king's ancient, common, and public highway there, and divers dangerous sand-banks, quick-sands, banks, and shoals, were formed therein, to wit, at, &c., so that the liege subjects of the king navigating, &c. with their ships, &c. in, through, and along the said river, and king's ancient, common, and public highway there, could not navigate, &c. in so free, safe, and uninterrupted a manner as of right they ought, and before had been used and accustomed to do, to the great damage and common nuisance, &c. The second count charged the defendants with making certain additions to geers before erected. The third count charged them with erecting geers, &c. The fourth charged the keeping and continuing of certain chains and anchors fixed to certain buoys in the navigable part of the river. Fifth count charged placing buoys, with chains and anchors fixed to them, in the river. Sixth count charged the unlawfully and without lawful excuse causing and permitting divers vessels to stay and remain

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in the river near a certain staith belonging to the defendants for a long time, to wit, &c., to the obstruction of the navigation. Seventh count was for straitening, narrowing, and obstructing the navigation generally. Eighth count for casting a great quantity of coals, stones, and other substances into the river, and thereby obstructing the navigation. Plea, not guilty. At the trial before *Bayley J.* at the York Summer assizes 1824, the facts of the case were proved to be as follows: The defendants were the owners and occupiers of a coal-mine at *Wallsend*, on the north side of the river *Tyne*. For the purpose of shipping their coals, they had caused to be erected two staiths. These erections consist of piles (technically called geers) driven into the bed of the river, on the top of which a platform and railway are laid, the coal-waggons pass along this railway, and at the end are lowered, by means of a machine called a drop, into the hold of the vessel. The coals are there deposited, and the wagon raised up again by the machine, and placed on the railway. One of these staiths extended nearly 150 feet, and the other 130 feet from high water mark into the river, and each of them extended a few feet beyond low water mark. The drops, when let down, extended forty feet further, and ships when taking in their cargo were obliged to lie at that distance from the staiths, but the drops when drawn up did not occasion any obstruction to the navigation. When ships are not laden at staiths, the coals are first taken on board of small craft, called keels, and cast by hand from the keels into the ships. When ships are laden in this manner, they generally have a keel lying on each side, and thus occupy a greater space in the river than when laden by means of the staiths and drops, and their cargoes cannot be put on board in less than

than double the time. The expence of shipping coals in this manner is greater, and the coals are in worse condition, than when shipped by means of the staiths. It was proved that the staiths indited occasion, at particular times of tide, a considerable obstruction to small craft navigating against the stream, and for some time before and after high water occupy a considerable space which would otherwise be navigable by large vessels; but if there were no staiths, the number of keels used on the *Tyne* would be greatly increased, and the river would be very much crowded with them. There was a sand-bank at the south side of the river opposite one of the staiths in question, and it was proved to have increased after that erection was made, in consequence of the change thereby produced in the current of the water. The corporation of *Newcastle* are conservators of the river *Tyne* and port of *Newcastle* (which extends further up the river than the place where the staiths were erected), and gave the defendants leave to erect the staiths; but no writ of *ad quod damnum* was ever executed. When the learned Judge began his summing up, it was agreed that if the defendants were acquitted, the prosecutors might, on the ground of any supposed misdirection, move to enter a verdict for the crown, or for a new trial. He then proceeded to state his opinion that the use of a navigable river was not for passage only, but for other important rights which might supersede the right of passage. That when a great public benefit accrued from that which occasioned the abridgment of the right of passage, that abridgment was not a nuisance, but proper and beneficial; and he directed the jury to acquit the defendants if they thought that the abridgment of the right of passage in this case was for a pub-

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a public purpose, and produced a public benefit, and if it was in a reasonable situation, and a reasonable space was left for the passage of vessels navigating the river *Tyne*; but otherwise to find a verdict for the crown. He then pointed out to them that the staiths were not merely a private benefit, for that by means of them the coals were brought to market at a smaller expence, and in a better condition, in both which respects the public were benefited; and he then left to their decision the following questions: Were the staiths erected in a reasonable place? Was there a reasonable space left for the public navigating in the *Tyne*? Were the staiths a public benefit? Did the public benefit counteract the prejudice done to individuals? The jury said that in consequence of this direction they found the defendants not guilty. In *Michaelmas term 1824*, a rule nisi for entering a verdict of guilty, or for a new trial, was granted, against which

Scarlett, Williams, Coltman, and Ingham, in *Hilary term 1826*, shewed cause. A verdict for the defendant in a criminal case cannot be impeached on the ground of its being against evidence, *Rex v. Reynill* (*a*); and the sole question now to be discussed is, whether the learned Judge was warranted in so stating the law as to authorize the jury in returning a verdict of not guilty in case their opinion on the points proposed to them should be in the defendant's favour? If the principle of law, as stated by the learned Judge, was correct, it is clear, according to the expressions of the Court in former cases, that it will not be enough for the prosecutor, in support of his rule, to shew, even if he be able to do so, that

(*a*) *5 East, 315.*

some portion of the reasoning or instances adduced in illustration of that principle may have been faulty, *Burrough v. White* (*a*), *Latimer v. Batson* (*b*). The principle is not only reasonable in itself, but seems consistent with all that has hitherto been received as the law on this subject. It is clear, upon the authority of both textbooks and decisions, that an erection in a port or navigable river is not to be deemed a nuisance simply because it infringes on the water-way. Lord *Hale* (*c*) says, “It is not every building below the high-water mark, nor every building below the low-water mark, that is ipso facto in law a nuisance, for that would destroy all the quays that are in all the ports of *England*, for they are all built below the high-water mark, for otherwise vessels could not come at them to unload; and some are built below the low water; and it would be impossible for the king to license the building of a new wharf or quay, whereof there are a thousand instances, if ipso facto it were a common nuisance; for the king cannot license a common nuisance. Nay, in many cases it is an advantage to a port to keep in the sea water from diffusing at large; and the waters may flow in shallows, where it is impossible for vessels to ride. Indeed, where the soil is the king’s, the building below the high-water mark is a purpresture, an incroachment, an intrusion on the king’s soil, which he may either demolish, or seize, or arant at his pleasure; but it is not ipso facto a common nuisance, unless, indeed, it be a damage to the port and navigation. In the case, therefore, of a building within the extent of a port, in or near the water, whether it be a nuisance or not is *quæstio facti*, and to be determined by

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(*a*) 4 *B. & C.* 328. (*b*) *Ib.* 682. (*c*) *De Portibus Maris*, 85.

a jury,

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a jury, on evidence, and not *quaestio juris*." This principle is also to be collected from the proceedings of the Court of Exchequer in the *Sutton Pool* case, which occurred when Lord *Hale* was Chief Baron. It appears from the decree in that case, which is dated 21st November, 16 Car. 2. and recites at length the proceedings, that the Attorney General had filed an information against the mayor and commonalty of *Plymouth*, and persons claiming under them, stating that the king was seized in fee, in right of his crown of *England*, of the ground and soil of the port, haven, and arm of the sea, called *Sutton Pool*; that the said pool, for freedom of trade and safety of ships there at anchor, ought not to be encroached upon; that the defendants had intruded and had built upon the soil theretofore at full sea covered with water, and within high-water mark of the said pool where ships had anchored, to the prejudice of the port and damage of the king, and praying that the ancient bounds of the pool might be ascertained, that the king might have possession of all buildings erected within them, and might provide for the preservation of the port, and cause such buildings as were nuisances to be removed. The decree then recites, that the defendants by their answer admitted, that all the buildings except one were within the high-water mark, but denied that they were nuisances, and made title to the soil of the pool under a statute of the 18 Hen. 6., and proceeds to state, that when the cause came on for hearing, the two points insisted on being, first, whether the buildings mentioned in the information were nuisances to the straitening and damage of the port; and, secondly, whether the soil between the high and low-water marks were the inheritance of the king or no; the Court ordered,

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ordered, that as to the right in the soil, a trial should be had at bar, and as concerning the nuisance, a commission should be awarded to enquire of certain articles to be approved by the Court. By the first of these articles the commissioners were to ascertain the ancient full sea mark; by the second to find what buildings have been made upon any part of the shore within the ancient full sea mark; by the third, "to find out and certify whether the houses, wharfs, keys, yards, gardens, or buildings, or any of them, made, enclosed, or enlarged in or upon any part of the shore within high-water mark, were a nuisance to the port of *Plymouth* or not, and which of them, and how much of them, or any of them, and wherein and in what manner." It is clear that if the Court had been of opinion that evidence of encroachments upon the water-way would suffice to prove a nuisance, they never could have directed the commission, particularly the enquiry directed by the third article would have been superfluous, the fact of encroachment being admitted by the defendant's answer. In like manner in a recent case, where an information of nuisance and intrusion had been filed by the Attorney General against certain owners of wharfs in *Portsmouth* harbour, and the issue came on to be tried at the bar of the Court of Exchequer when Sir *V. Gibbs* was Chief Baron, although it was distinctly proved by the witnesses for the crown that the wharfs projected into the water-way, and were, according to the theories of some engineers, nuisances to the port and navigation, yet the defendants admitting the encroachment, but contending, against the opinion of the engineers, that no injury was thereby done to either the port or the navigation; and that, according to the authority of Lord *Hale*, the jury were

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to determine the fact of nuisance upon all the circumstances of the case, the Court adopted that authority, and left all the evidence to the jury, who acquitted the defendants (*a*). These cases decided that the quality of nuisance does not attach to a building, as a consequence in law of its being within the limits of the water-way, but it is to be ascertained by the jury upon enquiry into the facts of the case: and hence it follows, that they sanction the enquiry, whether there be any benefit resulting to the public from such erections, to compensate to the public the unavoidable abridgment of their right of passage; that abridgment necessarily arising in some degree wherever the shore is built upon, and being pro tanto an evil, the only fact that can be presented to the jury so as to redeem the character of the encroachment, and entitle it to protection, must be the fact of compensation. So in the case of *Rex v. Lord Grosvenor and Others* (*b*), which will be cited on the other side, the Lord Chief Justice observed in his charge to the jury, "the public have a right to all the convenience which the former state of the river afforded, unless by the change some greater degree of convenience is rendered;" and again, "although the public were not able to enjoy this benefit, namely, that of a recess in the river, closed up by Lord Grosvenor's embankment, at all times; yet if they could derive benefit from it for the space of two hours each tide, they are entitled to that advantage, unless the want of it be compensated by some superior advantage resulting from the alteration." Now, although in that case the verdict was against the defendants, they

(*a*) Scarlett stated this case from his recollection of the facts, he having been counsel for the defendants.

(*b*) 2 Stark. 511.

having

having failed in shewing any compensation to the public; yet it is clear from the passages cited, that if there had been evidence to warrant a finding in the defendants' favour upon the several points, which the jury have in this case determined in favour of the present defendants, the Lord Chief Justice would have directed an acquittal. The principle of the learned Judge's charge in this case was conformable to all these authorities; but it has been objected, that there did not appear to have been any writ of ad quod damnum. Had this been an information for a purpresture, it might have been necessary to the defence to have shewn either a writ of ad quod damnum executed in the defendants' favour, and a licence thereon from the crown, or a patent containing a clause as recommended in *Fitzherbert's Nat. Brev.* 226 (H), declaring the king's grant to be valid without the issuing of such writ. But on the trial of an indictment like the present, the writ of ad quod damnum is immaterial. The inquisition under that writ was always traversable, and no licence granted on it could bar the subject of his right; so that, as it would have been no protection to the defendants if their works had been proved to be an injury to the exercise of any public right, the want of such writ ought not to lead to their conviction, if it appear on the evidence that the public have suffered no injury. If this objection be removed, the merits of the case, as disclosed by the prosecutors' own witnesses, were strongly in the defendants' favour, and the learned Judge was warranted in explaining to the jury how much the facility of loading by means of the staiths was in furtherance of commerce, to which the rights of navigation are instrumental. By this improvement in the despatch of loading and economy of space,

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more of the channel was left free, and for a longer time, for the transit of other vessels ; it gave accommodation to many more ships in the course of the year than had ever resorted to the port before the use of this method ; it was, in fact, equivalent to an enlargement of the dimensions of the port, and so a benefit, not a nuisance, to the navigation. But it was further remarked by the learned Judge, that the public were benefited as consumers by getting coal of a better quality, less broken, and at a cheaper rate. Even if this remark were erroneous, it would not vitiate the charge, according to the distinction already stated between what comes from the Court in the way of reasoning and illustration, and what is given as direction in law. But, in truth, these observations of the learned Judge were very proper for the consideration of the jury ; the cheapness of the coal not being a mere collateral benefit resulting from the staiths, but the direct consequence of their effect upon the navigation ; and the observation was made in answer to an argument urged for the prosecution, that they were built for private benefit only. A further answer to this objection is furnished by the several acts of parliament for the regulation of the coal trade. The earlier acts, 6 G. 3. c. 22. and 22 G. 3. c. 32., recite, that " by the regulations provided for that trade, the public in general, and the *London* market in particular, are constantly and regularly supplied with fuel on reasonable terms," thereby shewing that the prosperity of the coal trade was a matter of public concernment, and not of interest merely to the individual traders. The series of statutes which have passed since the introduction of these machines are also very material for the defendants. That which was in operation at the time of this indictment, is the

the 57 G. 3. c. 30. (local and personal), and which is judicially to be taken notice of as a public act. It directs that the coal owners shall, in their fitting offices, keep two distinct lists, one of vessels intending to load by keels, the other of vessels intending to load at the spouts or staiths; that they shall enter the vessels in the respective lists in the order of their application, provided a certain deposit or tender of price has been made, and shall load them according to the priority of their entry on the lists, with this important exception, that if a ship entered on the spout list shall have taken in two thirds of its cargo at the spout, it is to have its loading completed by keels, in preference to all ships on the keel list. The legislature, when these provisions were made, must have been aware that the staiths projected into such depth of water as to admit ships loading at them to float with two thirds of a cargo on board, and yet they have in some degree encouraged the use of them by this preference; moreover, these provisions, by denying to the fitter the selection of the persons he shall deal with, appear to treat the staiths as coal wharfs, to which all persons wishing to load with that commodity have a right to resort, and as such wharfs, they are entitled to protection within the express words of Lord *Hale*. It is no objection to this consideration of them, that they are not open to the delivery of goods of all kinds, for that is only the case with public wharfs licensed by the custom-house, inasmuch as none other may receive customable goods; and if the restraint from dealing with customable goods do not disqualify the private unlicensed wharf from protection, neither are the staiths to be disqualified on account of it being only a partial use that is made of them.

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Brougham, Tindal, Alderson, and Parke, contra. The real question in this case is, whether the direction given by the learned Judge to the jury as to matters of law, can be supported or not. There are two propositions fully established by authority and by principle, which shew that the direction given cannot be supported. First, that where a public right is infringed, that cannot legally be done without the sanction of a writ of ad quod damnum, and the King's licence, although an equivalent be given; and, secondly, that even if the principle of compensation be admissible, a public right, and not merely a public benefit, must be given as an equivalent; whereas in this case a benefit only was given, and that not to the parties injured, but to strangers who were not damnified by the alleged nuisance. As to the first proposition, *Hind v. Mansfield* (*a*) is directly in point. "M. was fined 200*l.* for diverting part of the river *Thames*, by which he weakened the current of the river, to carry barges, &c., towards *London*, and other houses of the king upon that river, and such a thing cannot be done without an ad quod damnum, because that river is as an highway." And it appears also by *Fitz. N. B.* 225., and the case of the *Isle of Ely* (*b*), that no alteration in a navigable river or channel can be made without first executing such a writ. So in *Payne v. Partridge* (*c*), which was an action against the owner of a ferry for letting it go to decay, and not suffering the plaintiff to pass over the ferry; defendant pleaded that he had built a bridge in the place of it. On demurrer the Court held that the owner could not let down the ferry and put up a bridge without licence and an ad quod damnum, but that no action would lie, the right in-

(*a*) *Noy*, 103.(*b*) 10 *Co.* 141.(*c*) 1 *Sart.* 12.

fringed

fringed being a public right. This case is the more to be observed, because the defendant had given to the public an equivalent, and, indeed, a better right, than that which they lost; and *Rex v. Ward and Lyme* (a), is to the same effect. In *The Attorney General v. Britain* (b), which was an application for an injunction to stop the building of a quay on the river *Mersey*, the Lord Chancellor directed an issue to try whether it was an injury to the port and harbour of *Liverpool*; and said it was not his intention to direct any trial as to the question, whether it was an injury to the navigation on the river *Mersey*, because it was his opinion that the tide-way of a river in the shallowest part of it could not be interrupted by buildings of that sort, unless there had been an antecedent execution of a writ of ad quod damnum by a jury. The notion of justifying the obstruction of a public right, by shewing that a collateral benefit results from it, is perfectly novel. There is no trace of any such doctrine in any decided case or text writer of authority. In *Hale, De jure Maris*, pt. 1. c. 3. p. 9., it is laid down that all navigable rivers, as well above the flowing of the sea as below, are public rivers, *juris publici*, and, therefore, all nuisance and impediments of passages of boats and vessels, though in the private soil of any person, may be punished by indictments, and removed; and this was the reason of the statute of *Mag. Car. c. 23.*, “*Omnis Kidelli deponantur per Thamisiam et Medwayam et per totam Angliae, nisi per costeram maris;*” and in *Coke’s commentary* on that chapter, 2 *Inst. 38.*, it is said, “And it appeareth by *Glanville* that this purpresture was forbidden by the common law; for he saith, ‘ Dicitur antem purprestura quando aliquid super dominum regem injuste occupatur, ut in

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(a) *Cro. Car. 266.*

(b) MSS.

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dominicis regis, vel in viis publicis obstructio vel in aquis publicis transversis a recto cursu, &c., et generaliter quoties aliquid fit ad nocumentum regii tenementi, vel regiae viae vel civitatis,' and every public river or stream is alta regia via, the king's highway." In all indictments and informations for obstructing navigable rivers the allegation is that the passage is injured, to the common nuisance of all the king's liege subjects navigating, passing, and repassing on that river. The plea of not guilty puts the fact of the obstruction by the defendant, and that only, in issue; and the simple question for the consideration of the jury is, whether the party accused has or has not occasioned the obstruction, as alleged in the indictment. No inquiry as to collateral advantages given to other persons can properly be entered into, and considerations of public policy are not legitimate grounds for the decision of a question of nuisance or no nuisance. The prosecutors in this case were bound to shew an injury arising from the staiths indicted, but if the defendants were properly allowed to enter into evidence of the advantages attending the use of staiths generally, the prosecutors also had a right to give evidence of injury done by other staiths, besides those which were the subject of the indictment. If such a course were allowed, it is obvious that no question of this nature could ever be tried before any jury. The only semblance of authority to support the summing up in this case is a passage in Lord *Hale*, *De Portibus Maris*, and the case of *Rex v. Lord Grosvenor* (a). The passage in Lord *Hale*'s treatise is in chap. 7, *De Portibus Maris*, part 2. In that chapter he gives several instances of nuisances to ports, and amongst others mentions, "the straitening of the port by building too

(a) 2 *Starkie*, 511.

far into the water, *where ships or vessels might have formerly ridden*; for it is to be observed that nuisance or not nuisance in such case is a question of fact;" and then follows the passage cited for the defendants. In concluding his observations upon that point he adds, " In many cases it is an advantage to a port to keep in the sea water from diffusing at large, and the water may flow in shallows where it is impossible for vessels to ride." Keeping in view the position to which Lord *Hale*'s observations apply, they can hardly be considered as making in favour of the defendants. It is impossible to dispute the assertion that nuisance or no nuisance is a question of fact; but if that question is left to a jury, with a direction wrong in point of law, the verdict ought not to stand. In an action for malicious prosecution, the question of malice or no malice is for the jury; but in like manner the misdirection of the Judge in such a case would be a ground for setting aside a verdict. The fact which Lord *Hale* means should be left to the jury is, whether any perceptible injury has been done to the port, and any sensible inconvenience felt by the ships resorting to it, that is to say, whether the encroachment extends to parts " where ships or vessels might formerly have ridden;" not whether a benefit has been conferred upon other persons greater in degree than the injury done to those making use of the port. In *Ex parte Armitage and Others* (a), which was a petition to quash a writ of ad quod damnum and the inquisition and return, it appeared that the writ was obtained for the purpose of procuring authority to alter a highway, by laying a rail-road upon it; and Lord *Hardwicke*, in giving judgment, said, " In all cases of writ of ad quod damnum, whether to change an old way for a

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(n) *Amb.* 294.

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new one, or to alter the condition of a way, the new way or way so altered must be to all intents and purposes as beneficial to the king and subjects as the old way was before." This shews that the principle of compensation, supposing it to have been admissible, was entirely misapplied in this case. Compensation has always been considered to mean something given to the party deprived of a right or advantage to which he was entitled. Here the parties injured were the persons navigating their vessels on the river *Tyne*, but the supposed compensation was given to the consumers of coal in *London* and other places supplied from the staiths. *Rex v. Lord Grosvenor*, which was relied on in support of this principle, and the application made of it, was very different from the present case; and the opinion of the Lord Chief Justice, before whom it was tried, appears to have been diametrically opposed to the direction given to the jury at *York*. That was an indictment for erecting a wharf on the river *Thames*, to the injury of the navigation of the river. The defendant claimed a right of soil under the corporation of *London*, who were conservators of the river, and contended, that they had a right to erect the wharf, provided it did not interfere with the navigation of the river. Upon that the Lord Chief Justice asked, " Will you contend that you have a right to narrow the river *Thames*, so long as you leave a space sufficient for the purpose of navigation?" And then the point was abandoned. Surely this does not justify the direction given in the present case, that the jury should acquit the defendants, if they thought that a reasonable space was left in the river *Tyne* for the passage of ships. An attempt was then made to shew that the erection of the wharf was of great service in affording facilities for loading and unloading vessels; but

but the Lord Chief Justice, in summing up, said, “ The question here is, whether a public right has not been infringed? An embankment of considerable extent has been constructed for the purpose of building a wharf. Much evidence has been adduced on the part of the defendants for the purpose of shewing that the alteration affords greater facility and convenience for loading and unloading; but the question is not whether any private advantage has resulted from the alteration to any particular individuals, but whether the convenience of the public at large, or of that portion of it which is interested in the navigation of the river *Thames*, has been affected or diminished by this alteration?” It is difficult to understand what advantage the defendants can derive from the judgment in this case; and that of the *Sutton Pool* appears to be as little in their favour. Certain instructions to inquire into the extent of the injury done were given to commissioners in that case; but if the doctrine of compensation had then been known, a fourth instruction would have been given, viz. to inquire into the collateral benefit conferred upon the public by the erections then complained of. There are many records in the Exchequer of informations by the crown against persons who have been charged with encroachments in navigable rivers or ports: *The Attorney-General v. Philpot*, 8 Car. 1.; *The Attorney-General v. Errington*, 16 Car. 1.; *The Mayor of Bristol v. Morgan*, 11 Car. 1.; *The Attorney-General v. The Mayor of Plymouth*, 16 Car. 2.; *The Attorney-General v. Parmether* (a); and in no one of these did the defendant set up the benefit conferred upon the public as an answer to the information. But supposing it was right to take into account a compensation given,

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(a) 1 Dow. 316.

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not to the party who sustained the injury, but to other persons, still that compensation was wholly insufficient in the present case, inasmuch as it was merely a public benefit, and not a public right. The staiths are private property, and the owners are not compellable to ship coals at them. That may depend upon the caprice, skill, industry, or capital of the owner. Suppose the collieries from which coals were shipped at these staiths to have been worked out, or to have been rendered unproductive by some accident, would the staiths have been thereby rendered a nuisance if they were not so before? But it is said, that these staiths are public, and the acts of parliament requiring all vessels to be laden in turn have been relied on to support the assertion; these acts, however, are nothing more than a qualification of a private right. The owners of the staiths need not ship coals at all unless they please; but if they do, it must be done subject to the regulations imposed by those statutes. The case of *Rex v. Warde and Lyme* completely supports this argument; that was an information against the defendants for stopping up a common highway. The defendants confessed that there was such a highway, and that they stopped it up, but alleged, that before it was stopped one C. S. laid out on the adjoining land another way more commodious to the public, and a writ ad quod damnum issued, and an inquisition taken upon it found that it would not be to the damage of the king and the public if a licence were granted to stop up the old highway, for that another way was laid out as beneficial for the people, absque hoc that they inclosed it ad commune nocumentum. Upon demurrer, it was urged and held by the Court that the plea was bad, because the allegation that C. S. laid out another way more beneficial for the king's people, not shewing by

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what authority he did it, was not good, for it was but at his pleasure, and he might stop it when he would.

Cur. adv. vult.

The case stood over for consideration until this term, when the learned Judges, not being agreed in their opinions, delivered judgment *seriatim*.

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HOLROYD J. (a) This was an indictment for wrongfully continuing two geers or staiths with spouts in the *Tyne*, a public navigable river, to the public nuisance of the navigation. There was a verdict for the defendants. A motion was made to set it aside, and instead thereof to enter a verdict for the crown. It was agreed at the trial, that if the Judge's direction was wrong, a verdict should be entered for the crown, if the Court should be of opinion the jury ought so to have found; or that a special verdict should be entered, if the Court should think it right.

I am of opinion that there is not sufficient ground to set aside the verdict, on account of any misdirection of the Judge, or on any other account that I am aware of.

The facts proved were as follows: — Two geers had been erected by the defendants for loading ships therefrom with coal, each extending *below the low-water mark* a foot or two, with spouts therefrom, one of which extended thirty-six feet; the other parts of the geers were between high and low-water mark. One of these geers was in existence in 1800; the other was not erected till afterwards. It appeared that they were substituted for loading the ships instead of loading them by keels.

(a) *Littledale J.* having been consulted in the case when at the bar, declined giving any opinion.

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Subsequently statutes passed giving to the public rights of loading in turn at these spouts, so long as they continue, which thereby have become clothed, as long as they continue, with public rights, in addition to the private rights of the proprietors. These statutes, therefore, consider that the spouts are not to be taken to be *per se*, and *at all events*, nuisances or illegal.

But, independently of these statutes, there are public and private rights, with regard to the port for traffic and commerce in coals, and also other merchandise. There is a public right of navigation on the river for that and other purposes. There are, also, public or private rights of fishing; public or private rights on the shore. For traffic there are rights, not only of navigation *sc. eundo et redeundo*, but *morando* (so far as necessary or reasonable) for loading and unloading, or for a wind, &c. The enjoyment of each of those rights by some is frequently and necessarily an obstruction to the free and complete enjoyment either of the same right or of some other of the above rights in others; ex. gr. ships at anchor in the channel of the river, are an obstruction to ships sailing, &c., boats and wherries plying, keels lying in the river, are also an obstruction. But such obstruction is not necessarily, or as a matter of law, a public or a private nuisance. Each of the rights above mentioned must at times occasionally yield and become subordinate, as may be necessary or reasonable, at least in part, to some of the others. The public (that is each individual) has not an *absolute* right to navigate (i. e. sail over) every part of the river, but only where there is not otherwise a legal pre-occupation (as in some cases there may be) by others. Ships, in order to load, must lie, if not at the staiths, in the channel of the river with their loading keels.

keels. So in other trades, the ships lie at the wharfs, or elsewhere, in the river or port, to load or unload, and their obstruction to others is or is not, as well as the erection of the wharf itself, a nuisance to the navigation, in like manner as the staiths or geers themselves in the coal trade are or are not a nuisance according to circumstances. Whether they are so or not is dependent upon circumstances; and is, therefore, according to Lord *Hale*, a question of fact for the jury (*a*). After specifying as a nuisance "the straitening of the port by building too far into the water, where ships or vessels might have formerly ridden," he adds, "it is to be observed, that nuisance or not nuisance, in such a case, is a question of fact. It is not, therefore, every building below the high-water mark, nor every building below the low-water mark, that is *ipso facto* in law a nuisance."

The only objection to the geers on the indictment is, that they are unlawful, as being a public nuisance to the navigation. The defendant's right to have them there, and to continue and use them, is not impugned on any other ground.

The defendants getting their coals by a proper access to and upon the river would have a right to load ships lying and continuing in the river for that purpose, by the means of keels, although the doing so might be a temporary, and by doing it successively to different ships, might be a continued, though not total, obstruction or inconvenience to the navigation. And there would be a right to keep the ships and keels in the river for that purpose in convenient and proper places, at times not confined to the times of their being in actual use. And the evidence on the part of the

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(*a*) *De Portibus Maris*, 85.

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defendants was to shew that the mode of loading the ships by the geers in question was less an obstruction to the navigation, and was more beneficial to the public; in fact, that it was a benefit instead of a nuisance, and, therefore, not subject to the present indictment. And the jury upon the evidence were of that opinion, and upon the learned Judge's directions, with regard to the law of the case, they found a verdict for the defendants. And are the staiths to be deemed a nuisance if they be such as the conservators of the river and port, or as a jury would, pro bono publico only, be desirous should be made, or as a jury would deem upon the evidence a beneficial, instead of an injurious change, for a general use of the port and river?

Loading by the spouts is not necessarily a nuisance, because it is recognized by statutes (the public local acts of 57 G. 3. c. 30. s. 17., and 5 G. 4. c. 72. ss. 9, 10. 17.); and so long as the geers and spouts continue the public have a right to have their ships loaded, in turn, at them with coals, supposing them not to be illegal.

But it is objected that they are at all events illegal, for want of a writ of *ad quod damnum*, and a favourable return of the inquisition thereof; and also that the jury have been, or may have been, misled by the direction of the learned Judge; that his direction is incorrect in law, and further that the jury ought to have found a verdict for the crown.

1st. As to the want of the writ of *ad quod damnum*. This is not like the case of shutting up a public highway, and setting out another in lieu; that cannot be done so as to do away the former public right, and to create a new public right, without a writ of *ad quod damnum*. The former can only be abrogated by the writ of *ad quod damnum*,

num, and the proceedings, and the king's licence thereon ; but that is not requisite here, as I conceive, when the question is, Whether the mode of enjoyment in question of some of the public rights of the port, river, and navigation, is or constitutes in fact a public nuisance ? If that mode of enjoyment be not, in fact, such a nuisance, it does not, as I conceive, become so for want of the writ of ad quod damnum, though, without such a writ, and a favourable inquisition thereon, they who erect or do those works act at their peril ; and though the want of such a writ may be a good ground for the Lord Chancellor's interfering for the security of the public, and by injunction restraining any person from erecting works or buildings that interfere with the exercise of a public right, till it be ascertained by the writ of ad quod damnum, that their so doing is not a public nuisance or injurious to the king or his subjects.

I now come to the consideration of the learned Judge's direction to the jury. It appears that the following observations were made by him as to the question of law arising upon the evidence which had been given :

" If wherever there is a power of passage over the water of a navigable river there is a public right of way for all the king's subjects, not only in the channel, but on all the places where vessels can go at the height of the tide ; if that is a right of way which is to yield to nothing, but which the public is at all times entitled to insist on for the purpose of passage, then the prosecutor's counsel shall be at liberty to apply to the Court to enter a verdict for the crown, because these staiths interfere where, at high water, the river was navigable before they were erected. But my opinion is, that the use of a public water is not for passage only, but for many other purposes,

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purposes, and that many of those purposes are entitled to supersede the right of passage, and to narrow the rights of passage to those parts which may not be requisite for greater and more beneficial purposes.

"Where there is a space of water of very considerable extent, some part may be most usefully applied for the purposes of commerce, and that which is so applied may be over and above that which is sufficient for navigation; and where a great public benefit results from the abridgment of the exercise of the rights of passage, the great public benefit makes that abridgment no nuisance, but a useful, beneficial, and proper purpose. Therefore, if in this case you shall say that that which has been taken *from the opportunity* of passage has been taken for public purposes, and for the public benefit, and that it is placed in a reasonable situation, and that enough is left for the ordinary and reasonable purposes of passage, I shall recommend it to you certainly to find this not a nuisance."

That which was taken from the opportunity of passage, was taken for public purposes and for the public benefit; that is to say, for the exercise of rights deemed by the statutes, which I before referred to, to be beneficial, and to be vested in and exercised by the public. Then the learned Judge proceeded to make certain qualifications of that which had fallen from him.

"If you shall be of opinion that this is a place which for public benefit it ought not to be in, that reasonable space is not left for the purposes of passage; if you shall think that no public benefit (and this was properly a question for the jury) results from this erection, I should recommend it to you to find a verdict for the crown. And if you shall find that this in any part

part of it goes further than, *for public purposes*, it ought to go, then as to that part, you pointing out in your verdict what part it is, I should recommend it to you certainly to give a verdict for the crown."

Then the learned Judge proceeded: "It was suggested while the case was going on, that this was a staith for the private purposes of the individuals, and not for the public benefit. I beg to suggest for your consideration, because my opinion is different in that respect, it seems to me that notwithstanding the individual is the proprietor of it, notwithstanding it gives him the opportunity of bringing his commodity to the market, yet if it is beneficial to the public that that thing should be brought to the market, and brought to the market in that way, then the thing is, as it seems to me, useful to the public, who come to that staith for the purpose of having their vessels loaded, and to the people who want to carry coals to the *London* market. Both the man who receives the coals at the staith, and the man who buys his coals at *London* coming from that staith, are benefited, if they are either got by those means cheaper, or if they are got by those means better than they otherwise would be: thus it is of public benefit that the thing should be there."

These are observations, merely in answer to the assertion, that the staiths were for private benefit only, to shew that public benefit also may result from them, and are observations well founded in fact, and true, as it appears to me.

But then it is said they are inapplicable to the question the jury were to try, and ought not to be taken into consideration by them. But it seems to me that, so far as, and for the purpose for which they were urged, namely,

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namely, as an answer to the allegation, that those staiths were for private purposes and not for public benefit, and to do away with the effect of such an assertion they might be taken into consideration by the jury, and were warrantably used. They were a mere answer to an unfounded suggestion of the prosecutors, and not part of the direction to the jury; but if they had been so, yet qualified as they were by what followed, which were the points which were left to the attention and consideration of the jury, I think no fault is to be found. The learned Judge proceeds: "Therefore, the points to which I wish your attention to be directed will be, Was this staith in a reasonable place, and is it applied to purposes of public benefit? Was reasonable space left for the purpose of navigation? And do the purposes of public benefit resulting from the staith countervail the prejudice which individuals may sustain by having the exercise of their rights of passage narrowed?"

At the conclusion he says, "Thus, gentlemen, I apprehend I have pointed out to you the true ground on which your verdict is to be founded. If you think this is placed not in a reasonable part of the river, that it does an unnecessary damage to the navigation, or that this is not of any public benefit, or that the public benefit resulting from it is not equal to the public inconvenience which arises from it, then you will find your verdict for the crown. If on these points you are of a different opinion, then for the defendants." Upon this, the jury found a verdict for the defendants.

The whole of this direction, taken together, is in substance correct, qualified in the different parts as it is; and I see no sufficient reason to enable me to say, the jury

jury have drawn such a conclusion from the evidence as to warrant the Court in setting aside their verdict.

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BAYLEY J. I agree with my Brother *Holroyd* in this case, that there ought not to be a new trial; and though I regret extremely that there should be a difference of opinion on the part of my Lord, I am happy to think the difference between us is limited to a single point, and that too, one which would hardly be likely to lead to a different result upon a new trial. I have, indeed, considered the subject with every degree of attention on my part, and should willingly act on his judgment in preference to my own, but I feel so strong a conviction in my own mind, that I think I cannot, in justice to the defendants, give up my own opinion. I believe we are all agreed, that a writ of ad quod damnum was not requisite in this case, and that if these staiths are not upon the facts and merits a nuisance, the neglect to make them the subjects of an ad quod damnum will not make them so. The points presented to the jury were, Whether these staiths were erected in a part of the river where it was reasonable ships should load? Whether a reasonable space was left for navigation? Whether the loading of vessels, by means of them, was a public benefit? Whether they extended into the river further than the public benefit required? and, Whether the public benefit they produced was greater than the public injury they occasioned? Upon each of these points, the verdict shews that the jury were in favour of the defendants. The only point upon which our difference rests is, I believe, the point of public benefit, not the point *upon the preponderance of public benefit*, but the question, what might be taken into con-

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sideration as matter of public benefit? I certainly suffered the jury to take into their consideration, as part of the public benefit, the possible reduction of price at the staith, the possible reduction of price in the *London* market, and the improved quality in which the coals would arrive there; and if I was wrong in suffering them to take any of these points into their consideration, the verdict may have proceeded upon a wrong principle, and there ought to be a new trial. Mr. *Brougham* had strongly pressed upon the consideration of the jury that these staiths were beneficial only to the individuals to whom they belonged, and that they conferred no benefit upon the public; and in answer to this point, I submitted to the consideration of the jury, that if, by means of these staiths, an article of great public use found its way to the public at a lower price, and in a better state than it otherwise would, I thought these were circumstances of public benefit, and points they might take into their consideration upon that head; and upon the best attention I have been able to give the subject, I am bound to say, I continue of that opinion. The right of the public upon the waters of a port or navigable river is not confined to the purposes of passage; trade and commerce are the chief objects, and the right of passage is chiefly subservient to those ends. Unless there are facilities of loading and unloading, of shipping and landing, much of the public benefit of a port is lost. In the infancy of a port, when it is first applied to the purposes of trade and commerce, unless the water by the shore be deep, the articles must be shipped in shallow water from the shore, and landed in shallow water on the shore. Boats or vessels of small draft must be employed to fetch and carry from and to the shore, and

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the commodity must pass from boat to ship, or from ship to boat. Breakage and pilferage and waste, besides the expence of boating, are some of the probable concomitants of such a mode. As trade advances, the inconvenience and mischief of this mode are superseded by the erection of wharfs and quays, and what is, perhaps, an improved species of loading wharf, a staith. The loading or unloading is then immediate from the wharf or staith into the ship, or from the ship upon the wharf. But upon what principle can the erection of a wharf or staith be supported? It narrows the right of passage. It occupies a space where boats before had navigated. It turns part of the water-way into solid ground; but it advances some of the other purposes, the main purposes of a port, its trade and commerce. Is there any other legal principle upon which they can be allowed? Make an erection for pleasure, for whim, for caprice; and if it interfere in the least degree with the public right of passage, it is a nuisance. Erect it for the purposes of trade and commerce, and keep it applied to the purposes of trade and commerce, and subject to the guards with which this case was presented to the jury, the interests of trade and commerce give it a protection, and it is a justifiable erection, not a nuisance. What says Lord *Hale*, *De Portibus*, c. 7. p. 85.? "In the case of building into the water where ships or vessels might formerly have ridden, whether it be nuisance or not nuisance is a question of fact. It is not every building below high or low-water mark that is, ipso facto, in law a nuisance, for this would destroy all quays, which are *all built below high-water mark*, otherwise vessels could not come at them to unload, and some are built *below low-water mark*." In what does the trade and commerce

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of any port consist? in its exports and its imports; and to whom do the public benefits of a port result? to the port and its neighbourhood, and to the places with which it trades. The exports may, and in many instances do, consist of the produce of the neighbourhood and of the port, and the individuals to whom they belong are induced to send them, not from patriotic views of encouraging the shipping interest, of promoting a nursery for seamen, or of benefiting the place to which such produce is sent, but from the mere selfish principle of individual advantage; but if *public benefit* results, is it a right view of the question to look at the *motive* instead of considering the effect? If the conduct of many individuals, though proceeding wholly and exclusively from private motives of private profit, produce results of great public benefit, and the question is proposed, whether public benefit be or be not produced, am I to answer the question in the negative, because *public benefit* was never in the contemplation of the individuals by whom it is produced? If, then, the exportation of the produce of a neighbourhood will increase the trade and commerce of a port, and that trade and commerce will benefit every place to which that produce is sent, how is that exportation to be advanced? By giving facilities to exportation, by reducing the expense to the owner of that produce, by enabling him to export upon terms which will insure him a profit and a market. What is the great export trade of *Newcastle*? The produce of its neighbourhood,—coals. Who are the first movers in that trade? The owners of the neighbouring mines. Why do they send the coals to market? for the sake of profit only,—their motive is selfish only. But are the owners of these mines the only persons interested in the export

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'of coals? Exclusively of the shipping interest and the persons who are concerned in the carrying trade, when the owners are tempted by the hope of private profit to join in the exportation, what is to be said of the great body of purchasers at the market to which the coals are carried? Have they no interest in having coals, and having them cheap and good? Stop the *Newcastle* coal trade, and where is the inconvenience felt? In *Newcastle* and its neighbourhood, to a certain extent undoubtedly. But in *Newcastle* and its neighbourhood only? Certainly not. To a much greater extent in *London* and in the other markets to which *Newcastle* coals are sent. Throw any impediment upon the trade, deteriorate the coals, or increase the price, and where does the pressure fall? Undoubtedly upon the market to which this coal is sent. Encourage the trade, make the article cheap, and improve its quality, and who reaps the benefit? The market to which the article is sent. Facility in loading is one of the chief means to give the trade encouragement. It brings to market produce, which otherwise would not pay for bringing. It increases the number of sellers, and has a tendency to produce such a competition as will keep the price low. The staiths in question save the ship one fourth of her loading time, prevent pilfering, breakage, and waste, and send to market a better commodity by 6d. a chaldron than would otherwise arrive there. And is this nothing to the *London* purchaser? He has from these two staiths 600 cargoes, above 100,000 chaldrons of prime coals, coals in an unbroken state, instead of the same quantity of coal in an inferior condition, — keel coals. And if from the benefit which the owner of the mine has from the staith, and the purchaser

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at the staith has from expedition and otherwise, the coals are sold in the *London* market at a lower price, I cannot help thinking that a public benefit results to the *London* buyers, and that the jury were entitled to take it into their consideration. I did not assume that the article would be cheaper, that was for the consideration of the jury; but if it were, I thought it an ingredient to be considered upon the question of public benefit. Is the place in which the public benefit accrues material? Does it signify whether it accrues in the port of *Newcastle* or in any other part of the kingdom? The king is equally the guardian of the public rights of all his subjects; all his subjects are equally under his care; and if public benefit results, it is immaterial whether it is to his subjects in *London* or to his subjects in *Newcastle*. Nor can it be a question, whether the benefit results from a private or a *public* staith; from the staith confined to the goods of a single individual, or from a public one, which any one may use. In estimating the amount of public benefit which a staith produces, the extent to which it is used may be material; but if a private individual, with his own coals, keeps it in full employ, I think it equally entitled to protection, on account of the benefit it confers upon the distant market, the market to which the coals are carried, whether it be public or private. I have hitherto considered the case with reference to these two staiths only, and to the public benefit which they confer upon the *distant market*; but when the question is considered with reference to the state of the port of *Newcastle*, the necessity of taking into consideration the effect upon the distant market appears to me more prominent. There are twenty-eight similar staiths, many, if not all, for the private purposes of particular

ticular coal owners. Exclude the question of public benefit to the *London* market from the staiths in question, and must it not be excluded from each and every one of those staiths, and what will be the state of the *London* market when the purchaser can meet with nothing but keel coal? But will he be able, even, to get keel coals. There must be staiths, as was in evidence upon the trial, for loading keels. And if a ship staith is to be proscribed because it is erected and used for the private benefit of the proprietor of a particular coal-mine, and because the public benefit to the market cannot be taken into consideration, must not keel staiths, when erected and used for the private benefit of a like proprietor, be excluded also? It will interfere, though in a less degree, with the freedom of passage, and though a nuisance of less magnitude, will still be a nuisance. For these reasons I am of opinion, that upon the question of public benefit, the probable effect upon the price and meliorated condition of the coal were proper for the consideration of the former jury; that if the case were to go to another jury, they would still be proper ingredients for their consideration, and that the direction given in that respect is free from objection.

Lord TENTERDEN C. J. I am sorry that I cannot concur in the opinion of my two learned Brothers on the present occasion.

I am not prepared to say that I think the verdict ought to be entered for the crown, but, with all deference to them, I am compelled to own that my mind would be better satisfied if the cause were again sent to trial by another jury.

I do not think the want of a previous writ of ad quod

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dannum conclusive against the defendants. Such a writ is highly proper where the crown is applied to for a grant of any liberty or franchise; and so far, at least, necessary, that probably no person would think himself justified in advising the king to make any such grant, where possible injury to an existing right could be surmised, without the sanction of a previous inquiry under the writ. It may also be, and I think it is a prudent and proper measure before a subject takes upon him to act for himself, and on his own judgment. The want of it furnishes an argument against the propriety of his act, because it shews that he is apprehensive of the consequence of a previous inquiry, and fears that its result may be unfavourable to his views. And where the object of any proceeding is to prevent the accomplishment of an act intended or begun, as an application for an injunction, the want of this previous proceeding may properly form a very material ingredient in the consideration of the question. It is also deserving of consideration and attention on the trial of an indictment. But the finding under this writ, when favourable to those at whose instance it has issued, is traversable, it is not conclusive in their favour; it is not a bar to an indictment for a nuisance. The jury, by whom such an indictment is to be tried, have a right to exercise their own judgment upon the matter, and may find that to be a public nuisance which, under this writ, has been found not to be to the prejudice of his Majesty's subjects. And as the finding is not conclusive on one side, I cannot think the absence of any finding conclusive on the other. In my opinion, speaking with great deference to the high authority that is reported to have spoken of the want of such a proceeding as conclusive, the jury

who

who try an indictment for a nuisance have a right to exercise their own judgment on the question, as well in the absence of such a proceeding, as where such a previous inquiry has taken place.

I come now to mention my reasons for saying that my mind would be better satisfied if the cause were sent to another trial.

The erections in question are said to be in the port of *Newcastle*, by which I understand to be meant that they are within the limits of the jurisdiction of that port. *They are certainly at a considerable distance below the public quays and places of general resort of vessels trading to that port, and must be passed by vessels resorting to and from such places.* And I take it to be clear that the passage of such vessels is, in certain seasons at least of wind and tide, rendered less free and commodious; that the water-way is in some degree narrowed at present, and may possibly, and not improbably, be further narrowed in process of time by the gradual accumulation of sand and silt carried to the opposite side of the river. The erections were made and maintained for the private convenience of the owners of particular collieries: all who think proper to purchase their coals from these collieries have a right, under a particular act of parliament, to be supplied in turn by application at some office at *Newcastle*. The owners of the collieries cannot choose to whom they will vend, but they may choose at what seasons they will vend, and whether they will vend at all; and seasons may occur when they have no commodity to vend. It was proved that coals put into vessels from these staiths are less broken, and come to market in distant places in a somewhat better state than those which are brought to the vessel's side in keels

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or barges, and so undergo a double shipment or removal. But I think it may well be doubted whether they come to market at any cheaper rate, or at a rate so much cheaper as to be worth consideration. When all arrive at a market, I should apprehend those which are found in the best state will fetch the best price, and so the advantage, as far as price is concerned, will be to the owners of the staiths and collieries, and not to the public.

Admitting, however, that there is some public benefit, both from the price and condition of the coals, still I must own that I do not think those points could properly be taken into consideration in the question raised by this indictment. That question I take properly to have been, whether the navigation and passage of vessels on this public navigable river was injured by these erections. Upon this question there was evidence on both sides, regard being had to that obstruction, which must necessarily take place by the transfer of coals from keels or other vessels confined to the navigation of the river, into ships of a different kind passing to sea. And if the question had been left entirely in this form, and a verdict found for the defendants, I do not, as at present advised, see that any objection could have been properly made to it. In some parts of my learned Brother's direction to the jury, and especially toward the close, the case appears to have been left mainly on this ground. But in other parts, remarks were made on the public benefit of the nature that I have alluded to, which might probably, in my judgment, have an effect upon the minds of the jury, coming as they did from so high and from so respectable an authority, that I think ought not to have been produced. I am far from thinking that where the direction of a Judge is in the main, and

taken

taken altogether, right and consonant to law, a verdict is to be set aside on account of occasional or casual expressions, that upon more mature consideration may be thought incorrect. And I desire that no such inference may be drawn from my present judgment. It would be a very ill compliment to juries to suppose that they are likely to be misled by such accidental expressions. But in the present case I am bound to say, that I think the matter went further, and that my mind is by no means satisfied that the verdict was not materially influenced by considerations that I think ought not to have affected it.

For these reasons I should be better satisfied with a new trial; but as those of my learned Brothers, who have felt themselves at liberty to take any part in the consideration of this question, think the verdict ought to stand, the rule for setting it aside and entering a verdict for the crown must be discharged.

Rule discharged.

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A SSUMPSIT on a promissory note for 160*l.*, bearing date the 19th *January* 1816, payable on the 30th *November* then next. Plea, *actio non accrexit infra sex annos*, upon which issue was joined. At the trial before Lord Tenterden C. J., at the *London* sittings after last *Michaelmas* term, the plaintiff proved that in 1819 the note was produced to the defendant, and payment of it

In assumpsit brought to recover a sum of money, the defendant pleaded the statute of limitations, and upon that issue was joined. At the trial the plaintiff proved the following acknowledgment by the

defendant, within six years: "I cannot pay the debt at present, but I will pay it as soon as I can." Held, that this was not sufficient to entitle the plaintiff to a verdict, no proof being given of the defendant's ability to pay.

demanded;

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demanded ; and that the defendant said, " I cannot pay the debt at present, but I will pay it as soon as I can." There was no proof of any ability on the part of the defendant to pay the debt. A verdict having been given for the plaintiff, a rule nisi for a new trial was obtained in *Hilary* term last, on the ground that such an acknowledgment was not sufficient to take the case out of the statute, without proof of ability. Cause was shewn against the rule by the *Attorney-General* and *D. F. Jones* ; and *F. Pollock* was heard in support of it, and the Court took time to consider of their judgment. The material facts of the case, the arguments urged by counsel, and the authorities cited, are so fully commented upon in the judgment of the Court, that it is unnecessary to state them here.

The judgment of the Court was now delivered by Lord TENTERDEN C. J. The question in this case was, Whether an *acknowledgment*, which *implied* that the debt for which the action was brought had not been paid was an answer to the statute of limitations ? The action was in *assumpsit*. Issue was joined upon the statute, and the acknowledgment proved was, " I cannot pay the debt at present, but I will pay it as soon as I can." The point therefore is, Whether this is such an acknowledgment as, without proof of any ability on the part of the defendant, takes the case out of the statute ?

There are, undoubtedly, authorities that the statute is founded on the presumption of payment, that whatever repels that presumption is an answer to the statute, and that any acknowledgment which repels that presumption is, in legal effect, a promise to pay the debt ; and that though such an acknowledgment is accompanied with only a conditional promise or even a refusal to pay, the law

law considers the condition or refusal void, and considers the acknowledgment of itself an unconditional answer to the statute; and if these authorities be unquestionable, the verdict which has been given for the plaintiff ought to stand, and the rule for a new trial ought to be discharged.

I refer to the cases of *Yea v. Fouraker* (*a*), *Lloyd v. Maund* (*b*), *Bryan v. Horseman* (*c*), *Leaper v. Tatton* (*d*), *Dowthwaite v. Tibbutt* (*e*), *Frost v. Bengough* (*f*), *Rowcroft v. Lomas* (*g*), *Swan v. Sowell* (*h*), *Mountstephen v. Brooke* (*i*). But if there are conflicting authorities upon the point, if the principles upon which the authorities I have mentioned are founded appear to be doubtful, and the opposite authorities more consonant to legal rules, we ought at least to grant a new trial, that the opportunity may be offered of having the decision of a court of error upon the point, and that for the future we may have a correct standard by which to act.

The act directs, that all actions of trespass, quare clausum fregit; all actions of trespass, detinue, trover, or replevin for goods; all actions of account and on the case, other than actions concerning trade between merchants; and all actions of debt grounded on any lending or contract without specialty, shall be commenced and sued (with an exception of actions for slander) within six years next after the cause of action or suit, and not afterwards.

Though this statute puts all these actions upon the same footing, it is only in actions of assumpsit that an

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| (<i>a</i>) 2 <i>Burr.</i> 1099. | (<i>b</i>) 2 <i>T. R.</i> 760. |
| (<i>c</i>) 4 <i>East</i> , 599. | (<i>d</i>) 16 <i>East</i> , 420. |
| (<i>e</i>) 5 <i>M. & S.</i> 75. | (<i>f</i>) 1 <i>Bing.</i> 266. |
| (<i>g</i>) 4 <i>M. & S.</i> 457. | (<i>h</i>) 2 <i>B. & A.</i> 759. |
| (<i>i</i>) 3 <i>B. & A.</i> 141. | |

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acknowledgment has been held an answer; and when, in the case of *Hurst v. Parker* (*a*), it was decided to be inapplicable to actions of trespass, Lord *Ellenborough* gave what appears to be the true reason, that in assumpsit "an acknowledgment of the debt is evidence of a fresh promise;" and that promise is considered as one of the promises laid in the declaration, and one of the causes of action which the declaration states. If an acknowledgment had the effect, which the cases in the plaintiff's favour attribute to it, one should have expected that the replication to a plea of the statute would have pleaded the acknowledgment in terms, and relied upon it as a bar to the statute; whereas the constant replication, ever since the statute, to let in evidence of an acknowledgment, is, that the causes of action accrued (or the defendant made the promise in the declaration) within six years; and the only principle upon which it can be held to be an answer to the statute is this, that an acknowledgment is evidence of a new promise, and, as such, constitutes a new cause of action, and supports and establishes the promises which the declaration states. Upon this principle, whenever the acknowledgment supports any of the promises in the declaration, the plaintiff succeeds; when it does not support them, (though it may shew clearly that the debt never has been paid, but is still a subsisting debt,) the plaintiff fails. In one of the earliest and leading cases upon the statute, *Heylin v. Hasting*, Com. 54. (reported also in *Ld. Raym.* 389—421. *Salk.* 29. and 5 *Mod.* 425., and mentioned 6 *Mod.* 309.) in assumpsit by an executor for goods sold by his testator, the defendant pleaded the statute, and the plaintiff

(*a*) 1 *B. & A.* 92.

proved,

proved, that within six years, defendant had said, "If you can prove your debt, I will pay it." The debt had been contracted above six years when this occurred; and whether this evidence would prove the issue for the plaintiff, *Holt* C. J. doubted. On motion in court, it was agreed by the whole Bench, that if six years elapse after a debt is contracted, and then the debtor acknowledges the debt, and promises to pay, evidence of such a promise and acknowledgment is good to maintain an action; but they doubted whether such evidence would support an action upon the first contract, and whether the plaintiff should not have declared specially upon the conditional promise; and *Rokeby* J. thought that an acknowledgment in such case, *without a promise*, would not bind; but *Holt* C. J. thought it would, and said, it had often been so held, though the contrary had also been held. *Holt* C. J. afterwards talked the point over with ten Judges at Sergeants' Inn, including the King's Bench Judges, and they agreed, upon consideration, that this promise, after six years elapsed, was sufficient evidence to maintain the declaration; for the defendant expressly promises payment *on proof of the debt*, which proof may be made in the same action. They all agreed, also, that if a man acknowledged a debt after six years, it was good *evidence of an assumpsit*, upon non-assumpsit *infra sex annos* pleaded, *for the jury to find a verdict for the plaintiff*; but it is not a matter upon which, if found specially, the Court could give judgment for the plaintiff; and the reason for this is, because the jury must draw the conclusion from evidence, not the Court. Lord *Raymond* and *Salkeld* both state, that the Judges thought that a general indebitatus assumpsit might well be maintained, because *the defendant had waived the benefit*

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benefit of the statute; but as the pleadings do not appear to have been calculated to raise the question of *waver*, and as neither of the reports in 5th or 6th *Mod. Rep.* notice this point, we have cited the case from *Com. Rep.*, because that report appeared to accord best with legal principles.

In *Green v. Crane* (*a*), in assumpsit by an executor upon promises to his testator, and non-assumpsit infra sex annos, the plaintiff proved, that within six years the defendant owned the debt, and promised payment; but the acknowledgment and promise were made, not in the testator's lifetime, but after his death; and whether that evidence would maintain the issue was the question; and after the case had been stirred twice, and the Court had taken further time to advise, *Holt C. J.* delivered the resolution of the Court, that they were all of opinion that the action could not be maintained, the promise being made to the executor, *and so out of the issue*. In *Sarel v. Wine* (*b*), the facts were exactly similar to those in *Green v. Crane*, and the Court acted upon that decision. In *Ward v. Hunter* (*c*) there was a similar determination. In *Manton v. Sculthorp* (*d*), the same point occurred again in the King's Bench, and they decided accordingly, that the acknowledgment to the executor was not evidence upon promises to the testator, and a nonsuit was entered. In *Pittam v. Foster* (*e*), in an action against *Foster and Norris and Wife* upon promises made by *Foster* and the wife *dum sola*, the defendants pleaded the statute, that the cause of action did not accrue within six years. Issue was taken thereupon, and the plaintiff

(*a*) *Ld. Raym.* 1101. 6 *Mod.* 309. *Salk.* 28. and 11 *Mod.* 37.

(*b*) 3 *East*, 409.

(*c*) 6 *Trant.* 210.

(*d*) *Trin.* 1818.

(*e*) 1 *B. & C.* 248.

proved

proved an acknowledgment by *Foster* after the marriage of *Norris* and wife; and whether that supported the issue, and entitled the plaintiff to a verdict, was the question; and upon argument, the Court was clear it did not; for the issue was, Whether there was any such promise within six years as the declaration stated? viz. a promise whilst the wife was sole; and a promise after the wife was married was not within that issue.

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All these cases proceed upon the principle that under the ordinary issue on the statute of limitations an acknowledgment is only evidence of a promise to pay; and unless it is conformable to, and maintains the promises in the declaration, though it may shew to demonstration that the debt has never been paid, and is still subsisting, it has no effect. The question then comes to this, Is there any promise in this case which will support the promises in the declaration? The promises in the declaration are absolute and unconditional, to pay when thereunto afterwards requested. The promise proved here was, "I'll pay as soon I can," and there was no evidence of ability to pay, so as to raise that which in its terms was a qualified promise, into one that was absolute and unqualified. Had it been in *terms*, what it is in *substance*, "Prove that I am able to pay, and then I will pay," it would have been, what the promise was taken to be in *Haylin v. Hastings*, a conditional promise, and when the proof of ability should have been given, but not before, an absolute one. Upon a general acknowledgment, where nothing is said to prevent it, a general promise to pay may, and ought to be, implied; but where the party guards his acknowledgment, and accompanies it with an express declaration to prevent any such implication, why shall not the rule "expressum

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“facit cessare tacitum” apply? In *Bicknell v. Keppell* (*a*), where the question was, whether the case was taken out of the statute by a letter, in which the defendant referred the plaintiff to his solicitors, and said “they are in possession of my determination and ability;” *Mansfield C. J.* seemed to think the defendant’s ability would come in issue upon the trial, and that the solicitors might be examined as to *the defendant’s ability*, as well as to the determination he had communicated to them; and in the late case of *A’Court v. Cross* (*b*), where the defendant said, “I know I do owe the money, but the bill I gave is upon a three-penny stamp, and I will never pay it;” *Gaselee J.* thought this acknowledgment did not amount to a promise to pay, or take the case out of the statute; and the Court, upon argument on both sides, were of opinion that he was right, and that where the defendant distinctly and expressly declared that he would not pay, a promise could not be raised by implication that he would. Upon legal principles, it appears to us, that this decision was right, and that in this case the rule for a new trial ought to be made absolute.

Rule absolute for a new trial

(*a*) 1 *New. Rep.* 20.

(*b*) 5 *Bing.* 329.

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GARNETT *against* FERRAND and Another.*Monday,*
May 28th.

TRESPASS for assaulting the plaintiff, and turning him out of a room. Pleas, 1. General issue. 2. That before and at the time when, &c. defendant *Ferrand* was one of the coroners for the county palatine of *Lancaster*, and being such coroner, was just before the said time when, &c. in the said room in the declaration mentioned, within the said county, and within his jurisdiction as such coroner, for the purpose of taking an inquisition upon view of the body of *B. C.*, then and there lying dead, within the jurisdiction of the defendant *Ferrand*, as such coroner, touching the death of the said *B. C.*, and that afterwards, and just before the said time when, &c. and while the said *Ferrand* was in the said room as such coroner, and for the purpose aforesaid, the plaintiff not having been summoned as a witness or juror touching the said inquisition, nor coming before the said *Ferrand* as such coroner, to testify any knowledge concerning the same, with force and arms, &c. wrongfully broke and entered into the said room, and intruded himself upon the said defendant *Ferrand*, so being therein as such coroner, and for the purpose aforesaid; and thereupon defendant *Ferrand* requested plaintiff to go and depart from and out of the said room, which he wholly refused to do, and continued in the same room in contempt of the defendant *Ferrand* as such coroner; and to the disturbance and violation of due order and decency in the administration of justice, and to the great hinderance thereof; and there-

No action will lie against the judge of a court of record for an act done by him in his judicial capacity, and therefore trespass cannot be maintained against a coroner for turning a person out of a room where he is about to take an inquisition.

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upon defendant *Ferrand* and the other defendant, as his servant, and by his command, gently laid their hands on the plaintiff and turned him out. The third plea alleged, in like manner, that defendant *Ferrand* was about to hold an inquest, and that plaintiff wrongfully broke and entered into the said room, for the purpose of wrongfully and illegally taking notes of and publishing the proceedings of the said inquisition; and plaintiff was then and there wrongfully and illegally about to take notes of and publish the said proceedings, and would then and there wrongfully and illegally have taken notes of and published the same if he had been permitted to remain in the said room during the said proceedings, to the great hinderance of public justice; and thereupon defendant *Ferrand*, in order to prevent the plaintiff from so wrongfully and illegally taking notes of, and publishing the proceedings before the termination of the same, then and there requested the plaintiff to depart, &c., as in the second plea. Fourth plea, that defendant *Ferrand* was in the said room, the same being a private room hired by him for certain business therein, and plaintiff wrongfully broke and entered the said room; whereupon defendant *Ferrand* requested him to depart, and because he refused, turned him out. Replication to second plea, that true it is defendant *Ferrand* was a coroner, and was in the room for the purpose in the plea mentioned, and that plaintiff entered, not being summoned, &c., and refused to go out; and plaintiff further saith, that afterwards, and whilst defendant *F.* was in the room for the purpose of holding the inquisition in the second plea mentioned, and after all the jurors had been duly sworn to inquire touching the death of the said *B. C.*, plaintiff then and still being a liege

liege subject of the realm, peaceably and quietly entered into the said room, the door thereof being then and there open, to witness and be present at the said inquisition so then about to be taken, the said room being then and there sufficiently capacious to admit the presence of the plaintiff at the said inquisition, without any manner of obstruction or hinderance to the taking thereof, and then and there continued, &c., without this that defendants committed the trespasses in the second plea mentioned, with the residue of the cause in that plea alleged. The replication to the third plea contained the same admissions, and alleged the same facts as the last, and traversed the residue of the cause stated in the third plea. Replication to the fourth plea, that defendant *F.* was coroner, and about to hold an inquest on *B. C.* in the said room, and that plaintiff, being a liege subject, peaceably entered the said room, the door being open, and the room having been hired for the purpose of taking the inquisition, to witness and be present at the said inquest so about to be taken, the said room being sufficiently capacious to admit the presence of plaintiff at the inquisition without obstruction to the taking thereof, and continued in said room, conducting himself peaceably and quietly, and in an orderly and proper manner, for the purpose of witnessing and being present at the said inquisition, until defendants turned him out, &c. Special demurrer to the replication to the second and third pleas, for that they did not tender any single or material issue, and were argumentative; and also for that the plaintiff had not in the inducement to the special traverse expressly alleged any new matter, nor admitted nor expressly denied the allegation in the pleas; and also for that the special traverse in each

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the coroner before Magna Carta, for by c. 17., his power to hold pleas of the crown was taken away. "No sheriff, constable, escheator, coroner, nor any other our bailiffs, shall hold pleas of our crown." Upon this, Lord Coke (*a*) says, "And what authority had the coroner? The same authority he now hath, in case when any man come to violent or untimely death, super visum corporis, &c., abjurations and outlawries, &c., appeals of death by bill, &c. This authority of the coroner, viz. the coroner solely to take an indictment super visum corporis, and to take an appeal, and to enter the appeal; and the count remaineth to this day. But he can proceed no further, either upon the indictment or appeal, but to deliver them over to the justices: and this is saved to them by stat. *Westm. 1. c. 10.*" It may, however, be said, that as to some matters arising out of this inquiry, the inquest of the coroner is final, ex. gr., that the deceased was *felo de se*; that a certain thing was *deodand*; that a certain person was guilty, and fled for it. There are one or two dicta in the books that these findings are not traversable. But it appears by the best authorities, that the inquests of the coroner are in no case conclusive, and that any one affected by them, either collaterally or otherwise, may deny their authority, and put them in issue, *Rex v. Alderman (b)*, *Ripley's case (c)*, *Rex v. Parker (d)*, *Holland v. Ellis (e)*, *Anon. (f) Vin. Abr. Coroner (F)*. *2 Hawk. c. 9. s. 55. Com. Dig. Officer (G 12)*. *1 Hale, P. C. 416.*, where it is said, "But although an inquisition taken before the coroner, super visum corporis in the point of *felo de se*, is of great authority, and a sufficient record, whereupon process

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(a) *2 Inst. 52.*

(b) *3 Keb. 564. 604. 2 Lev. 152.*

(c) *Sir T. Jones, 198.*

(d) *3 Keb. 489.*

(e) *1 Ventriss, 278.*

(f) *Ib. 259.*

a misdemeanor, because it was a preliminary inquiry: but if a person has a right to be present and hear them, he has also a right to publish what he hears. In all cases of preliminary inquiry care is taken that the evidence given shall not be published. Grand jurymen are sworn to secrecy; and there is not any substantial distinction between the nature of proceedings before a grand jury and of those before a coroner. Upon the finding of either, the party accused may be tried and convicted, and attainted, or he may be outlawed and his goods forfeited. *Rex v. Killinghall* (a) and *Rex v. Eriswell* (b) will be cited for dicta that a coroner's court is open. In the former, a grand jury had found that a certain thing was a deodand; and upon a motion to quash this inquisition, it was argued, that it being an office of entitling, ought to be publicly and openly found; and Lord *Mansfield* said that was so by express statutes. In the same case, Lord *Mansfield* said, that inquisitions before the coroner are traversable; and Lord *Kenyon*, in *Rex v. Eriswell*, said, "The examination before the coroner is an inquest of office: it is a transaction of notoriety, to which every person has a right of access; and writs of ad quod damnum have been frequently set aside for want of this notoriety in the execution of them by the sheriff." When Lord *Mansfield* spoke of express statutes, he probably alluded to the statutes of escheators, 34 *Ed. 3. c. 13.*, 36 *Ed. 3. c. 13.*, 36 *H. 6. c. 16.*, 1 *H. 8. c. 8.*, which were made in consequence of the misconduct of those officers, and required that their inquests should in future be taken openly; but the office or court of the coroner is not in any degree affected by them. Lord

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(a) 1 *Burr. 17.*(b) 5 *T. R. 707.**Kenyon's*

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Kenyon's dictum may also be referred to the same source, viz. a confounding of the statutory provisions relating to these inquests of office with coroner's inquests (*a*). The statute of *Marlbridge*, 52 H. 3. c. 25., may be cited as a legislative declaration, that all persons above twelve years of age ought to be present at inquests for the death of man; but that only relates to persons summoned by the coroner, as appears by the commentary, *2 Inst. 147.*

But, secondly, if it be held that the court of the coroner is an open court, still he is the judge of it, and possesses, in common with the judge of every court, power to exclude all persons not connected with the proceedings, whose presence he thinks likely to obstruct the administration of justice. The law does not, indeed, authorise the Judges of the superior courts to act arbitrarily, and make the courts, in effect, close; but the right to have them open is the right of the public, not of any individual, and consequently no individual can maintain an action against the Judge for excluding him (although a Judge acting corruptly is liable to punishment by proceedings of a different nature). This power of exclusion is constantly exercised by the Judges of other courts. The Lord Chancellor hears causes in his private room; and it will hardly be contended that an action of trespass would lie against the Lord Chancellor for directing the exclusion of any individual who intruded upon him there. The Judges of assize, when decency requires it, order many persons to be excluded from the courts. If every per-

(*a*) He evidently speaks of inquisitions before coroners, as upon the same footing with inquisitions upon writs of *ad quod damnum*: but the latter being directed to the escheators (*F. N. B. 509.*) were by express statute to be executed publicly.

son, for whom there is sufficient space, has a right to be in court, he would have a right to be in any part of it, even on the bench, if there were sufficient space there: the inconvenience resulting from the exercise of such a right is a strong argument against its existence. If, indeed, a Judge should act *corruptly*, either in the exclusion of any individual or of the public from his court, or in giving an improper judgment, or in doing any other wrongful act in his judicial situation, he is liable to punishment by proceedings of a different nature: if a Judge of the superior courts, he may be proceeded against by impeachment; if of the inferior courts, by indictment or criminal information. No action at the suit of a private individual will lie against the Judge of a court of record for any act done by him in the exercise of his office. The plaintiff in this case, therefore, has mistaken his remedy, even if he was improperly excluded from the room.

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Parke contrà. The most important question arising upon these pleadings depends upon the nature of the proceedings before the coroner, whether the inquiry is of a public nature for the purpose of ascertaining the fact, and such as takes place in the ordinary courts of justice, or on an inquest of office; or whether it is an ex parte and secret inquiry, such as takes place before grand juries and magistrates, for the purpose of accusing a particular individual, which is admitted to be private, according to the decision in *Cox v. Coleridge* (a). That the inquiry before the coroner is public will appear, both by statutes and old authorities defining the nature of his duties, and the obligations of the public towards

(a) 1 B. & C. 37.

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him. 2dly. By authorities which establish that individuals have certain rights in respect of inquests, which cannot be exercised unless they are present, and, therefore, they must have a right to be present. 3dly. By the express dicta of modern Judges. The office of coroner is very ancient; and in *3 Bulstr. 176.*, *Doddridge* J. says, the commencement of it is not well known: his court is a court of record (*a*), and his functions various: he is to inquire of treasure trove, wreck of the sea, the death of man, and the escape of murderers, *4 Inst. 271.* [*Bayley* J. At common law the coroner had power to hear and determine felonies, at that time, therefore his court was analogous to the ordinary courts of law, but his powers were abridged by *Mag. Car. c. 17.*] He still has power to inquire of the death of man, and that inquiry does not necessarily lead to the accusation of any individual; that it may terminate in such an accusation is not a sufficient ground for saying the inquiry should be secret. Thus in slander, where words imputing felony are justified, the trial of the issue may lead to the accusation of the Plaintiff, for he may be tried upon the finding of the jury; yet that does not make the trial of the issue a secret proceeding. The statute of *Marlbridge, c. 25.*, is an express authority that all persons of the age of twelve years ought to be present at an inquest for the death of man. The former part of that chapter remedied the grievance which was before felt from amercements imposed upon townships, because all persons of the age of twelve years did not attend the coroners inquest on all occasions, and provided that there should be no amercement, if a sufficient number

(a) *Britton, c. 3. fo. 3.*

came

came to take the inquest, but excepts out of that provision inquests for the death of man; and there is nothing either in the statute, or the commentary, to show that it was applicable to those persons only who had been summoned. This statute has never been repealed. In the History of the Commonwealth, by Sir *T. Smith*, who was one of the principal secretaries of *Ed. 6.* and *Eliz.*, he says, "The impanelling of this inquest (the coroner's), and the view of the body, is commonly in the street, in an open place, and in *coronâ populi*." (a) In *Freeman's Rep.* 419. there is an anonymous case, in which the court held that a finding of *felo de se* by a coroner's inquest is traversable; and Lord *Hale* distinguished it from a *fugam fecit*, because "all the parties that were present at the death of the party are bound to attend the coroner's inquest, and their not appearing there is a flying in law, and cannot be contradicted." The coroner now claims a right to exclude all or any persons at his pleasure. Secondly, individuals have many rights in respect of coroner's inquests, which cannot be exercised unless they are allowed to be present. Lord *Hale*, in his *Pleas of the Crown*, vol. ii. p. 62., after stating the argument on both sides, says, "The coroner's inquest ought in all cases to hear the evidence upon oath, as well that which maketh for, as that which maketh against the prisoner, and the whole evidence ought to be returned with the inquisition;" and this was so held in *Barclies' case* (b), and *Rex v. Scorey* (c). Now if a person has not a right to be present, he cannot tell when evidence tending to criminate him is given, so as to be able to adduce evidence in answer. Again, in *Cox v. Coleridge*, it was admitted,

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(a) *P. 96.*(b) *2 Sid. 90. 2 H. P. C. 60.*(c) *1 Leach, Cr. Ca. 43. 4th edit.*

that

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that even on an inquiry before a magistrate the party accused has a right to have the assistance of counsel. Again, a subject has a right to move to set aside an inquisition for irregularity, but of that he cannot have any knowledge unless present, *Rex v. Hethersal* (a). It is argued on the other side that this inquiry was preliminary only, and therefore not public. It may be admitted that it was preliminary, and to a certain extent the finding traversable, but that does not conclude the question. It partakes of the nature of an inquest of office, at which all the public have a right to be present. This right was secured by the statutes of escheators, which were declaratory of the common law. In *Rex v. Bickley* (b) it was held that a party interested had a right to cross-examine the witnesses at an inquisition to find debts, although the finding was traversable; and in *Rex v. Killinghall* (c) Lord Mansfield likened the coroner's inquest to other inquests of intitling. An attempt has been made to liken the coroner's inquest to the proceeding before a grand jury. But there a particular individual is in the first instance charged with a crime, before the coroner no individual is at first pointed out: the first inquiry is whether a crime has been committed; this is a proceeding for information, the other for accusation. The oath taken by the jurors is different. Those of the grand jury are sworn to keep their counsel secret, at the coroner's inquest the court is opened by proclamation, and secrecy is not required by the oath. Before the grand jury the party accused has no right to bring witnesses, but the coroner is to hear evidence on both sides. The depositions made before the grand jury

(a) 3 Mod. 80.

(b) 3 Price, 454.

(c) 1 Burr. 17.

are

are not evidence against the prisoner, in case of the death of the witnesses; those taken before the coroner are evidence on the very ground that the party affected has a right to be present and cross-examine the deponents. Thirdly, there are several dicta of modern Judges that the coroner's inquest is a proceeding to which all persons have a right of access. In *Scott v. Shearman* (*a*), *Blackstone* J., speaking of the finding *fugam fecit* by the coroner's inquest, says, "The reason given in some of the books why this inquest is not traversable, like other inquests of office, is because of the notoriety of the coroner's inquest super visum corporis, at which the inhabitants of all the neighbouring villages are bound to attend, and so the finding of the flight is but in effect recording the absence of the party;" and he adopts this, and applies it to a proceeding *in rem* in the Exchequer. Lord *Mansfield*, in *Rex v. Killinghall* (*b*), likens the coroner's inquest to other inquests of office, which are open by express statutes; and in *Rex v. Eriswell* (*c*) Lord *Kenyon* expressly says that the examination before the coroner is a transaction of notoriety to which every one has a right of access. It is said that the plaintiff had no right to be present, because if he had such right he would also have a right to publish the proceedings, and *Rex v. Fisher* (*d*) and *Rex v. Fleet* (*e*) were cited; but those cases only shew that a person cannot justify a publication on the ground of its being a statement of the proceedings before a coroner, provided it would otherwise be punishable; and *Rex v. Carlisle* (*f*) shews that a party has not a right

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FERAND.
(*a*) 2 *Sir W. Bl.* 981.(*b*) 1 *Burr.* 17.(*c*) 3 *T. R.* 707.(*d*) 2 *Camp.* 563.(*e*) 1 *B. & A.* 379.(*f*) 3 *B. & A.* 167.

to

the argument at the bar. The court of the coroner is a court of record of which the coroner is the judge; and it is a general rule of very great antiquity, that no action will lie against a judge of record for any matter done by him in the exercise of his judicial functions; *Floyd v. Barker* (a), *Poole v. Gwynn* (b), *Dr. Groenveldt v. Dr. Burwell and Others* (c), *Hamond v. Howell* (d). I shall mention the particulars of the case last cited only. *Hamond* and other jurymen had been fined and imprisoned by the Court at the *Old Bailey*, for acquitting certain persons of a riot, whom the evidence shewed to be guilty. This was certainly a very strong exercise of authority, calculated to excite, and in fact exciting great public interest. It was determined by the Court of Common Pleas, on a writ of *habeas corpus*, that the fine and imprisonment were contrary to law, and the parties were discharged out of custody. After this, *Hamond* brought an action of trespass against the Recorder of *London*, one of the judges in the commission, for this imprisonment. The defendant, by his plea, shewed the proceedings before the commissioners, and averred that the jury had pronounced an acquittal against plain evidence, and the direction of the Court in matter of law. The plaintiff traversed the finding against evidence, and upon these pleadings it was held that the action did not lie, because the defendant was a judge of record. This freedom from action and question at the suit of an individual is given by the law to the Judges, not so much for their own sake as for the sake of the public, and for the advancement of justice, that being free from actions they may be free in thought and independent in judgment, as all

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(a) 12 Co. 24.

(b) *Lutw.* 935. 1560.(c) 1 *Ld. Raym.* 454.(d) 1 *Mod.* 184. 2 *Mod.* 218.

elude justice by flight, tampering with witnesses, or otherwise. Another matter, as that of *deodand*, may be consequential to the inquiry; but nothing that is done will be conclusive upon the person to be affected by it. All is traversable. It was admitted in the argument, that secrecy and exclusion may be proper and necessary when charge and accusation begin. It is obvious, that this may begin as soon as the evidence begins. Cases also may occur, in which privacy may be requisite for the sake of decency; others, in which it may be due to the family of the deceased. Many things must be disclosed to those who are to decide, the publication whereof, to the world at large, may be productive of mischief without any possibility of good. Who then is to decide whether privacy be necessary or proper? We answer, the coroner, and the coroner alone, and that the propriety of his decision cannot be questioned in an action. In the case of *Hamond v. Howell* before mentioned, the plaintiff, by his traverse, attempted to put in issue for trial before a jury, the question whether the verdict was or was not against evidence, but he was not allowed to do so. And if the reason, which may lead the coroner or judge to think privacy necessary, cannot be tried, it need not be alleged or shewn in pleading, for nothing need be alleged that is not traversable. Further, it was properly asked in the argument for the defendant, if every man has a right to be present at such an inquest, for whose presence there is room in the place where it is holden, why has he not a right to be present at every part of that place? And if every man has a right to choose his station, and to decide for himself whether there be space to contain his person, it is easy to see that much disorder and confusion may often arise.

T t 2

Even

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Even in cases where absolute privacy may not be required, the exclusion of particular persons may be necessary or proper. Who then is to decide upon this? We again answer, the coroner, and the coroner alone, and that the reason of his decision cannot be tried in an action. It will be, in many cases, impossible that a proceeding should be conducted with due order and solemnity, and with the effect that justice demands, if the presiding officer, whether he be judge, coroner, justice, or sheriff, has not the controul of the proceeding, and the power of admission or exclusion according to his own discretion. It is not to be expected that any person will act at the peril of being harrassed by a multiplicity of actions, and of having his reasons and motives weighed and tried by juries at the suit of individuals who may be dissatisfied with his conduct. There are very few who will not prefer rather to admit disorder and confusion, and all the evil consequences that may follow from the indiscriminate admission of those who may choose to intrude, than to place themselves in a situation of so great jeopardy. The power of exclusion is necessary to the due administration of justice. There is nothing to shew that it has been abused in the present instance, nor are we aware that it has been abused in any other.

For these reasons we are of opinion that the judgment should be entered for the defendant.

Judgment for the defendant.

1827.

RAWSTHORN *against* ARNOLD.*Saturday,
May 26th.*

THIS cause, and all matters in difference between the parties, were referred to an arbitrator by an order of Nisi Prius, which was afterwards made a rule of court. On the 28th of *December* last, the arbitrator made an award, and directed that a verdict should be entered for the defendant. In this term, the Attorney-General obtained a rule nisi to set aside the award, on the ground that the arbitrator had not decided all matters in difference; and this rule was founded upon an affidavit, specifying certain matters which were alleged to have been in difference, and which were not mentioned in the award.

Where a cause and all matters in difference were referred to arbitration, and a motion was made to set aside the award on the ground that the arbitrator had not decided upon certain matters in difference: Held, that it was not necessary to state those matters in the rule; inasmuch as they were specified in the affidavit upon which the rule was obtained.

Where a cause is referred by order of Nisi Prius, a motion to set aside the award, must be made within the time allowed for moving for a new trial, unless a sufficient reason for delay be shewn.

Cross Serjt. shewed cause, and contended, that the rule should have specified those matters, according to the rule of court made in *Easter* term, 2 G. 4. (a) [Lord Tenterden C. J. I think that the rule, coupled with the affidavit, sufficiently explains the nature of the objection made to the award.] Then the application is too late; the award was made in *December*; judgment was entered up early in *January*; the motion should therefore have been made in *Hilary* term.

The *Attorney-General* contra. This was not a reference under the statute of the 9 & 10 W. 3. c. 15., and therefore the party was not bound to apply to the Court before the end of the term next after the making of the

(a) 2 B. & A. 539.

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award.

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award. Besides, it is not sworn that the plaintiff had notice of the award in time to make his application in *Hilary* term.

Lord TENTERDEN C. J. I think it was not necessary for the defendant to shew when the plaintiff had notice of the award. When a party makes an application to the Court after the time generally allowed for that purpose, it is incumbent upon him to shew a sufficient excuse for the delay; the plaintiff should, therefore, have sworn that he had not notice of the award, if that were the fact. It is true, that the reference in this case being by a rule of court made in a cause, is not within the statute; but, then, the party seeking to disturb the decision of the arbitrator should regularly have made his application within the period allowed for moving for a new trial, although the Court might not insist rigidly upon a compliance with that rule, if any sufficient ground were stated for asking indulgence.

Rule discharged.

Monday,
May 28th.

BENNETT *against* APPERLEY, Clerk.

It is not necessary that a writ of sequestration should be published before the return-day of the levavit facias, upon which it is founded; or that a copy of it should be affixed on the church-door, where that is not the usual mode of publication in the diocese where the benefice sequestered is situate.

the

the sequestration issued by him in a cause of *W. Devereux v. Apperley.*

It appeared by the affidavits that on the 15th of *August* 1826, the defendant gave the plaintiff a warrant of attorney to confess judgment for 1400*l.* and upwards. On the 17th of *August* judgment was entered up, and on the same day a writ of *fi. fa.* was issued, directed to the sheriff of *Hereford*, and returnable on *Monday* next after the morrow of *All Souls*. The sheriff returned *nulla bona*, but certified that the defendant was a beneficed clerk, viz. rector of the rectory of *Stoke Lacy*, and vicar of the vicarage of *Ocle-Pritchard*, both in his bailiwick, and within the diocese of the bishop of *Hereford*. On the 7th of *November* 1826, the plaintiff caused to be issued a writ of *levari facias de bonis ecclesiasticis*, directed to the bishop of *Hereford*, and returnable on *Monday* next after eight days of the *Purification*. This writ was delivered at the registry office of the bishop on the 8th of *November*, for the purpose of having sequestrations issued immediately, but none were in fact issued until the 26th of *December*, when they were issued, directed to the plaintiff's attorney, who, on the 7th of *January* 1827, caused them to be read in the parish-churches of the rectory and vicarage before mentioned, and at the church doors; and on the same day caused copies to be fixed on the church doors. On the 3d of *October* 1826, the defendant gave a warrant of attorney to *W. Devereux* for 1400*l.*, upon which judgment was entered up on the 26th of the same month, and a writ of *fi. fa.* was issued, directed to the sheriff of *Hereford*, returnable on the 6th of *November*. This writ was delivered to the sheriff on the 5th of *November*,

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who on that day returned nulla bona, and certified that defendant was a beneficed clerk, &c. On the 6th of November a writ of levavi facias was issued at the suit of *Devereux*, returnable on *Wednesday* next after the morrow of *Saint Martin*, and delivered at the registry office of the bishop of *Hereford* on the 7th of November. At the latter end of November writs of sequestration issued at the instance of *Devereux*, directed to one *Evans*, who on the 3d of December caused the same to be read in the parish-churches of *Stoke Lacy* and *Ode Pritchard*, and at the church doors; but no copies were fixed on the doors. *Evans* under these sequestrations obtained possession of the profits of the livings. It was not usual in the diocese of *Hereford* to publish sequestrations in any other way than by reading them in the church and at the door. The warrant of attorney given to *Devereux* was not stamped when this rule was obtained, but before cause was shewn a proper stamp had been put upon it.

Campbell and *Holroyd* shewed cause. The Court will not take notice of the time when the warrant of attorney was stamped; that ground for the motion therefore fails. Then, as to the other points, it appears that the writs of sequestration issued at the instance of *Devereux*, and were actually published long before the issuing of those granted to the plaintiff, and in the manner always followed in the diocese of *Hereford*. It may be objected that this was after the return day of the levavi facias, and therefore void; but the case of *Marsh v. Fawcett* (a)

(a) 2 H. Bl. 582.

shews

shews that the sequestration continues in force after the levari facias is returnable.

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Follett contrà. In the execution of the writ of levari facias, the Bishop is precisely in the same situation as a sheriff in executing a writ of fi. fa. All his authority is derived from the writ. The sequestration issued by the Bishop is in the nature of a warrant, giving authority to the person named as sequestrator to seize and take the profits of the benefice. It is nothing more than a mode of executing the writ of levari facias, for the Bishop cannot return sequestrari feci: his return must be levari feci, and the sequestration is of no avail until executed by publication, in like manner as the warrant is unavailing until execution by seizure; and in the one case the seizure, in the other the publication must be before the return-day of the writ. In *Doe v. Bluck* (a), it was held, that a sequestration was of no avail until publication; and in *Legassicke v. The Bishop of Exeter* (b), it was held, that if the sequestration is published before the levari facias is returnable, it suffices, and will continue in force until that writ is actually returned; and the case of *Marsh v. Fawcett*, relied on by the other side, did not go beyond the former decision. Then, as to the mode of publication, it is laid down by *Burn* in his *Ecclesiastical Law*, tit. *Sequestration*, and in *Tidd's Pr.* 1060. (c), that a copy must be fixed on the church-door; and the usage of any particular diocese cannot controul the rule of law upon this point.

(a) 3 *Campb.* 447. 1 *Cromp. Pract.* 559.

(b) Cited in *Marsh v. Fawcett*, 2 *H. Bl.* 583.

(c) 6th Edition.

Lord

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against
AYERLEY.

Lord TENTERDEN C. J. I am of opinion that this rule must be discharged. None of the authorities which have been cited satisfy me that publication must be made before the return of the levavi facias. It may be admitted, that until publication, no person's rights can be interfered with; and that is the whole extent of the decision in *Doe v. Bluck*. It was there held, that the sequestration would not prevent the bringing an ejectment by the incumbent upon a demise laid before the publication; but the learned Judge before whom the cause was tried, said, that the lessor of the plaintiff could not, after publication, have a writ of possession. I also think, that the mode of publication adopted in this case was sufficient. It may be convenient to fix a copy on the church-door, but I find no authority for saying that it is absolutely necessary.

BAYLEY J. I think that the property is bound from the time when the sequestrator is appointed, and that the publication of notice is only necessary in order to give priority against conflicting rights.

HOLROYD and LITTLEDALE Js. concurred.

Rule discharged.

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BECKWITH *against* J. PHILBY, J. WILKS, and
W. SPICER.

THIS was an action for assaulting, beating, hand-cuffing, and imprisoning the plaintiff; and keeping and detaining him handcuffed and imprisoned, without any reasonable or probable cause for forty-eight hours, on a false and pretended charge of felony. At the trial before *Littledale J.* at the *Spring assizes* for the county of *Essex* 1827, the following appeared to be the facts of the case. The plaintiff was a blacksmith residing at *Waltham Cross*, in the county of *Hertford*. The defendant *Philby* was high constable of *Ongar*, in *Essex*, and resided at *Loughton*, in that county. The defendants, *Wilks* and *Spicer*, were constables of that parish. The plaintiff, on the 31st of *January* 1826, with a bridle and saddle on his back, was returning from *Romford* market, where he had sold a poney for 7*l.* 10*s.*, and about half past six in the evening sat down to rest himself near *Loughton Bridge*. While he was sitting there one *Gould*, a farmer resident in the neighbourhood, passed him. *Gould* told *Philby* the circumstance, and said he thought he ought to look after the man. *Philby* went out and asked the plaintiff several questions, to which he gave such answers as induced *Philby* to think he had been stealing a horse, or was about to do so. The plaintiff was searched, and was again asked by *Philby* where he came from; the plaintiff then said that he had come from *Cheshunt*, and had been to *Romford* to sell a horse, that his name was *Beckwith*, and he had got the horse of one *Bartlett*. He then referred *Philby* to one *Noble*, who

A constable having reasonable cause to suspect that a felony has been committed, is justified in arresting the party suspected, although it afterwards appears that no felony has been committed.

lived

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against
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lived in the neighbourhood. No inquiry was made by *Philby* of *Noble* that night. *Philby* then sent for the defendant *Wilks*, to take the plaintiff to the watch-house, and on *Wilks*'s arrival desired him to handcuff the plaintiff, which was done. *Wilks* took him, at his own request, to a public-house at *Loughton*, and he remained there handcuffed during the night. On the following morning *Wilks* delivered the plaintiff to the custody of *Spicer*, who took him to a magistrate, who examined him, and said he thought it his duty to detain him, but that if there was anybody near who would be bound for his appearance, he might go home to his family. *Noble* became bound for the plaintiff's appearance, and he was then discharged. *Philby* was present at this examination. On inquiry at *Cheshunt* it appeared that the plaintiff had bought a horse of *Bartlett*, as he had stated, and nothing subsequently appeared against his character. No horse had been stolen in or near *Loughton* on the day, or for some days before the plaintiff was apprehended, but within the preceding month many had been stolen. Upon the evidence it was contended on the part of the defendants, that there was reasonable cause to suspect the plaintiff of having committed a felony; and that such reasonable cause of suspicion justified a constable or other peace officer in arresting and detaining the party suspected, even if it appeared that no felony had in fact been committed, although it would not in that case justify a private individual. It had been held accordingly, that a constable might justify an arrest in the day time on a reasonable charge of felony, without a warrant, although a felony had not in fact been committed; *Samuel v. Payne* (a).

(a) *Dougl. 358.*

If

If the mere assertion of a third person, that an individual has committed a felony is sufficient to warrant a constable in apprehending the party charged, à fortiori a suspicion formed by the constable on reasonable grounds and arising from the conduct of the suspected person, will justify the constable in arresting and detaining him. It has been held also, that watchmen and beadle have authority, at common law, to arrest and detain in prison for examination, persons walking in the streets at night, whom there is reasonable ground to suspect of felony, although there is no proof of a felony having been committed, *Lawrence v. Hedger* (a). For the plaintiff it was contended, that as there was no charge of felony made, nor any felony committed, the defendant *Philby* was not justified in making the arrest in the first instance, and still less were he and the other defendants justified in detaining the plaintiff during the night. The learned Judge was of opinion that the arrest and detention were lawful, provided the defendants had reasonable cause to suspect that the plaintiff had committed a felony, and he directed the jury to find a verdict for the defendants, if they thought upon the whole evidence that the defendants had reasonable cause for suspecting the plaintiff of felony. A verdict was found for the defendants, but liberty was reserved to the plaintiff to move to enter a verdict for nominal damages, if the Court should be of opinion that the arrest and detention were unlawful.

Gurney now moved to enter a verdict for the plaintiff for nominal damages, on the ground that a constable had no authority without a warrant to apprehend a person unless there was a charge of felony made by a

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against
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third person, or unless a felony had been committed. A constable acting on his own suspicion, places himself in the situation of a private person. The latter cannot lawfully arrest another unless a felony has actually been committed, and then it must be on his own suspicion, and not on report or suspicion of another. When a felony has been committed by some one, a constable may, upon the information of others, lawfully apprehend a supposed offender, without any knowledge of the circumstances on which the suspicion is founded. But if he act without having information from others, and on his own suspicion, then he, in the same manner as a private individual, must be liable to an action, if it afterwards appear that no felony has been committed.

LORD TENTERDEN C.J. I am of opinion that there is no ground for disturbing the verdict. Whether there was any reasonable cause for suspecting that the plaintiff had committed a felony, or was about to commit one, or whether he had been detained in custody an unreasonable time, were questions of fact for the jury, which they have decided against the plaintiff, and in my judgment most correctly. The only question of law in the case is, whether a constable having reasonable cause to suspect that a person has committed a felony, may detain such person until he can be brought before a justice of the peace to have his conduct investigated. There is this distinction between a private individual and a constable: in order to justify the former in causing the imprisonment of a person, he must not only make out a reasonable ground of suspicion, but he must prove that a felony has actually been committed; whereas a constable having reasonable ground to suspect that a felony has

has been committed, is authorized to detain the party suspected until inquiry can be made by the proper authorities. Now in this case it is quite clear upon the evidence, and the jury have so found, that the conduct of the plaintiff had given the defendants just cause for suspecting that he either had committed, or was about to commit a felony, and the jury having so found, I am of opinion that the action was not maintainable.

Rule refused. (a)

(a) See *Hawk. P. C.* b. 2. c. 12, 13. *Regina v. Tooley*, 2 *Lord Raym.* 1301. 11 *Mod.* 248. 3 *Inst.* 118.; and see also a *Treatise on the Office of Constable*, chap. 2. pl. 98. by *J. W. Willcock*.

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RULE OF COURT.

Easter Term, 8 G. 4. 1827.

WHEREAS some doubts have arisen in practice as to the number of defendants' names to be inserted in mesne process in actions by bill.

IT IS HEREBY ORDERED, that from and after the last day of this present term, in all actions by bill, the mesne process shall contain the name of the defendant, (or if more than one) of all the defendants in that action; and shall not contain the name or names of the defendant or defendants in any other action.

By the Court.

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Where justices, to whom a certiorari was directed, signed the return without putting their seals to it, or adding their description as justices, the Court sent back the return to be amended.

Where justices of peace, by virtue of the 55 G. 3. c. 68. s. 2., make an order for stopping up a footway as unnecessary, they must distinctly state, on the face of the order, in what parish, &c., the footway is situated, and must also describe its length and breadth.

Semble, That the order must be for the sale, as well as the stopping up of such footway.

TWO justices of Lancashire, by an order made in petty sessions, certified as follows:— “ We have viewed a certain public footway over and across the lands of R. W., in the parish of Flixton, beginning at, &c., and ending at, &c.; and two public footways, being branches of the said first-mentioned footway, one of which runs from the east side of the said first-mentioned footway, across the said lands of the said R. W., from, &c., to, &c., and the other runs from the west side of the said first-mentioned footway, across the lands of the said R. W., from, &c., to, &c.; and also one other public footway, beginning at, &c., and running over and across the lands of the said R. W. to, &c.; and we further certify, that the said several public footways did, and each of them did appear to us to be unnecessary. We therefore, pursuant to the statute in that case made and provided, do hereby, at the said special sessions, order the said footways to be severally stopped up.”

This order, having been confirmed on appeal at the April sessions for Lancashire, was afterwards, in due time, removed into this court by certiorari directed to the justices of Lancashire, and a rule obtained for quashing it. In Michaelmas term, 7 G. 4.,

(a) Two or more of the Judges of this court sat, as on former occasions, on the 29th and 30th of May, and from the 7th to the 14th day of June, both inclusive. During the sittings this and the following cases were argued and determined.

Courtenay, in support of the order, took a preliminary objection, that the return to the certiorari was bad, inasmuch as it was signed by four persons, who did not describe themselves as justices of *Lancashire*, and had not put their seals to the return.

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The *Court* then suggested, that he should take a rule to shew cause why the return to the certiorari should not be quashed, and that the other side should take a cross rule to amend.

In *Hilary* term, *Courtenay*, *Armstrong*, and *Aglionby* shewed cause against this rule. There is no doubt that the return is bad, and must be quashed, unless the Court think fit to allow an amendment, *Ashley's* case (*a*). Wherever such amendments are allowed the practice appears to be founded upon some express act of parliament. Thus, the 21 *Jac.* 1. c. 13. expressly states, that after verdict judgment shall not be stayed for want of the signature of the sheriff or other proper officer to the return of the *venire facias*. By the 16 & 17 *Car.* 2. c. 8., 9 *Ann.* c. 20., and 5 *G.* 1. c. 13., certain powers of making amendments are given, and the inference from these statutes is, that without such legislative provisions the Court had not that authority. But if the Court have the power, still it is to be observed that the amendment now sought to be made is for the purpose of reversing the judgment of the sessions; and in *Walker v. Slackoe* (*b*) Lord *Holt* C. J. said, that the statutes only authorized amendments in support of judgments; and in *Rex v. Mayor, &c. of Grampound* (*c*) the Court refused to allow an amendment, unless it was shewn to be in fur-

(*a*) 2 *Salk.* 479.

(*b*) 5 *Mod.* 69.

(*c*) 7 *T. R.* 698.

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therance of justice; here there there is no such evidence. In *Rex v. Newton* (a) a certiorari was returned in the same manner as the present. The Court were anxious to assist the party issuing it, but never thought of allowing an amendment, and a new writ was moved for. *Rex v. Atkinson* (b) will be relied on in support of the rule. In that case, an indictment having been removed into K. B. by certiorari, an amendment of the caption was afterwards allowed. But Lord *Mansfield*, who gave judgment, proceeded on the ground that a copy only of the caption was returned, and that the amendment would make it correspond with the original. The return in question is not a copy, and there is nothing to amend by. At all events, the return cannot be taken off the file and sent back to the justices, they must be brought into court to make the amendment; *Rex v. Franklin* (c), *Rex v. Serjeant* (d).

Scarlett and *Colman*, contra, were stopped by the Court.

ABBOTT C. J. I think we ought not only to allow the justices to complete the return, by putting their description and seals to it, but that we ought to compel them to do so, otherwise, we should put it in their power, either wilfully or by negligence, to defeat the process of this court.

Rule absolute.

The return having been sent back and amended, the validity of the order for stopping up the footways was now discussed.

(a) *Burr. S. C.* 157.
~ (c) *11 Mod.* 413.

(b) *1 Wms. Saund.* 250. n. (1).
(d) *1 Wms. Saund.* 250 e.

Courte-

Courtenay, Armstrong, and Aglionby, in support of the order. Two objections are made to the validity of this order; first, that the lands over which the footpaths pass are not stated to be in the parish of *Flixton*; secondly, that the width of the road stopped up is not stated on the face of the order. The first-mentioned footway is expressly stated to run across the lands of *R. W.*, in the parish of *Flixton*, and the second is stated to run across *the said lands*. To so much of the order no objection can be made. In describing the course of the other footways the word *said* is omitted, and they are stated to run across *the lands of R. W.*; but as no other lands of *R. W.* are mentioned besides those at first alleged to be in the parish of *Flixton*, the Court will intend, that all the footways were in that parish; *Rex v. Normanton* (*a*). At all events, the order is good, for the two footways expressly alleged to be in the parish. [*Bayley J.* In some cases an order may be good in part and bad in part; but here, the validity or invalidity of the order as to one part may be most essential as to the residue.] As to the second objection, it must be perfectly unnecessary to state the width of the road stopped up. It is equally stopped whatever be the width, and the public have nothing more to do with it. The setting out of a new road is a different thing, it may then be essential that the width of it should be mentioned, in order that the public may know what they have a right to use, *Davison v. Gill* (*b*). [*Bayley J.* The eighteenth form in the schedule to 13 G. 3. c. 78. states both the length and breadth of the road stopped up.] That is only requisite where the soil of the old road is to be sold, and

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(*a*) *Burr. S. C.* 213.(*b*) *1 East*, 64.

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the soil of an old footway cannot be sold either under the provisions of that act or the 55 G. 3. c. 68. The 13 G. 3. c. 78. s. 16. authorizes the diverting of a highway, and section 17. enables the surveyor to sell the soil of the old highway. Bridleways and footways are first mentioned in section 19. By that section two justices may under certain circumstances order highways, bridleways, and footways to be diverted and stopped up, and the highways and bridleways so diverted and stopped up may be sold, but no power is given to sell the old footways, but by section 21, if the new footway runs across the same person's land as the old one, he is to have the old in exchange for the new; if the new footway is over the lands of another, the damage done by the old footway is to be valued, and the amount to be paid by the owner of the land over which it passed, to the owner of that over which the new footway is made. The argument against the order on this ground, must rest entirely upon the 55 G. 3. c. 68. s. 2. Now that gives the justices at petty sessions power to divert, turn, and stop up footways; and to divert, turn, stop up and inclose, sell, and dispose of highways and bridleways, omitting footways. Then follows a provision, that if the justices shall upon a view think that any public highway, bridleway, or footway is unnecessary, they may make an order to stop up, and to sell and dispose of such unnecessary highway, bridleway, and footway. This latter word appears to have been inserted by mistake, for there can be no reason for selling an old footway, when it is stopped up, rather than when it is diverted and stopped up. At all events, in order to raise the objection, it should have appeared upon the order, that the public had a right to the soil of the old footway, so that there would be a subject matter of sale.

Another

Another objection has been made to the order, viz. that there should have been a separate order for stopping up each footway, but there is no such legislative provision either in the 55 G. 3. c. 68. or 13 G. 3. c. 78. In the margin of form 18. in the schedule, there is a note to that effect, but that is not the language of the legislature (*a*).

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Coltman, contrà, was stopped by the Court.

BAYLEY J. There are two grounds upon which I think that this order is bad. First, it does not sufficiently describe the parish in which some of the footways stopped up lie; and, 2dly. it does not describe the length or breadth of those footways, or order them to be sold. The first of these footways is described as running across lands of *R. W.* in the parish of *Flixton*, the second as running across the *said* lands: and although the parish is omitted, I think the word *said* sufficiently fixes the situation of the lands. But the third and fourth ways are described as running across the lands of *R. W.* not mentioning where they lie, and we are not at liberty to assume that the *lands* are the *said lands*; and then, there is nothing to shew that these last two ways are in the parish of *Flixton*. As to the other objection, I agree that under the 13 G. 3. c. 78. no power is given to stop up any highway, bridleway, or footway, unless another is substituted for it. But the 55 G. 3. c. 68. s. 2. provides first for the case of substituting a new way for an old one; and then follows the provision upon which this question turns, "and also when it shall appear upon the view of any two or more of the said justices of the peace, that any public highway, bridleway, or footway is unnecessary, it shall and may be lawful by order of

(*a*) This note is in the margin of the Parliament Roll.

and overseers of the poor of the parish of *Woodbridge*, in the county of *Suffolk*, that the paupers had become chargeable. Upon the hearing of the appeal it was proved that *George Thomas*, one of the magistrates who signed the order of removal, was at the time the order was made, one of the churchwardens of the parish of *Woodbridge*. The sessions confirmed the order of removal, subject to the opinion of this Court, whether the order of removal was or was not bad, on account of *George Thomas* being at the time when the order was made, one of the churchwardens of the parish of *Woodbridge*.

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Biggs Andrews, and *Prendergast*, in support of the order of sessions. One of the justices who made the order, being not only a rated inhabitant, but a churchwarden of the removing parish, the question is, whether it was competent to him to make the order. It will be said that he is an interested person, and therefore incompetent to adjudicate. In *Great Chart v. Kennington*(a), it was held that a justice who was charged, and chargeable with the poor rates, was not competent to make an order for removing a pauper from his own parish, on the ground that it was a judicial act, and that a party interested could not be a judge. The statute 16 G. 2. c. 18. was passed to remedy the inconvenience resulting from that decision, and it enables "justices for any county, city, borough, or town corporate within their jurisdiction, to do all acts appertaining to their office as justices, so far as the same relates to the laws for the relief, maintenance, and settlement of poor persons; and, notwithstanding, such justices are rated to or chargeable with the taxes, levies, or rates, within the

(a) *Burr. S. C.* 194.

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parish, township, or place affected by such acts." The third section provides, "that no justice shall act in the determination of any appeal to the quarter sessions from any order relating to such parish, township, or place where such justice is charged, taxed, or chargeable." That is the only exception. It is true, that in this case the removing magistrate was not only rateable to the poor, but also churchwarden of the parish. But that makes no difference, for a churchwarden can have no interest in the removal of a pauper except as a rated inhabitant; and the statute expressly says, that a justice may act, notwithstanding his interest in that respect. In a small borough where there is but one parish and two justices, it may happen that one of them may be churchwarden or overseer; and then if the argument on the other side is to prevail, an order of removal cannot be made. Besides, Mr. Thomas may have acted as a justice on the complaint of the other churchwarden and overseers alone who formed the majority, and could act for the whole body. Or taking it that he made the complaint, it may be that the complaint was made to Mr. Shawe alone, for it is not necessary that the complaint should be made to both the justices who subsequently make the order; *Rex v. Westwood* (*a*), *Rex v. Stanstead* (*b*).

Andrews and *Blunt*, contrà. The same person cannot be a party to, and a judge in a suit. The two characters are wholly incompatible; *Foxham v. Tithing* (*c*), *Rex v. Great Charte* (*d*), *Rex v. Yarpole* (*e*). Besides, his being

(*a*) 1 *Str.* 75.

(*b*) 2 *Salk.* 483.

(*c*) 2 *Salk.* 606.

(*d*) *Burr. S. C.* 194. 2 *Str.* 1175.

(*e*) 4 *T. R.* 71.

churchwarden would subject him to costs upon an appeal in some cases. Here, *Thomas* was both complainant and the party who adjudicated. But it is further to be considered that the removal of a pauper interferes with his personal liberty. The law has said, he is only to be removed by justices upon complaint of parish officers. He is therefore doubly protected. There must be the concurrence of two distinct classes of persons in order to bring about his removal. In favour of the liberty of the subject, this protection ought not to be narrowed, and it would be very much narrowed if the same person might act as churchwarden and magistrate. If the order is not bad because one of the justices was a churchwarden, it would not be bad if they were both churchwardens, and then a pauper might be removed at the pleasure of two individuals.

BAYLEY J. I think there was no objection to this order of removal, on the ground of interest in the magistrate. The statute 16 G. 2. c. 18. authorises justices to act (in the cases therein mentioned), notwithstanding they may be interested by reason of their being rateable. It is impossible to say that a churchwarden or overseer has any other interest in the removal of a pauper, except in his character of a rated inhabitant. He may, indeed, in the character of churchwarden, become liable to costs; but that responsibility can only attach to him in consequence of his improperly removing the pauper: it is, therefore, against his interest to make any order of removal as far as costs are concerned; for, by so doing, he subjects himself to a responsibility which would not otherwise attach to him. But I think that it is a fatal objection to this order, that the person
who

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who was the complainant heard and adjudicated upon the complaint. I cannot consider him as divested of the character of churchwarden at the time when the order was made. It purports to be made on the complaint of the churchwardens and overseers; and the statute 43 *Eliz. c. 2.* commits the management of the poor to the churchwardens and overseers. From the nature of the thing, the complaint must have been made by the churchwardens and overseers. Then, if the churchwardens made the complaint, the person who was one of the complainants heard and adjudicated upon it. Upon that ground I think the order of removal was bad, and that the order of sessions confirming it ought to be quashed.

HOLROYD J. I also am of opinion that the order of removal is invalid, on the ground that the same person cannot, in point of law, be the complainant and the person hearing the complaint. The statute 16 *G. 2. c. 18.* enacts that magistrates, who, by reason of being rateable to the relief of the poor in any parish, are virtual parties to the complaint of chargeability upon which an order of removal is founded, shall be competent to act in the making of such order. In this case the parish officers are not only virtual, but acting parties to the complaint. Now, it is quite inconsistent that the same person should be a party to, and a judge in a suit. The two characters are incompatible with each other. In this case, therefore, as one of the parties who made the order was churchwarden of the removing parish, and appears to have adjudicated upon a complaint to which he was a party, I think the order of removal was bad.

LITTLE-

LITTLEDALE J. I am of the same opinion. The statute 16 G. 2. c. 18., which enabled justices having an interest in the removal of a pauper, by reason of their being rateable in the parish, contemplated those cases only where there was one set of persons to complain and another to adjudicate, viz. churchwardens and overseers, as persons distinct from the justice to whom the complaint is made.

Order of sessions quashed.

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DAVIS, Executrix of WILLIAM GRIFFITHS,
against BRYAN, Gent., one, &c.

INDEBITATUS assumpsit. The declaration contained counts for money had and received by the defendant to the use of the testator, for interest due from the defendant to the testator, upon an account stated with the testator, for money had and received by the defendant to plaintiff's use as executrix; and, lastly, a count upon an account stated between defendant and plaintiff as executrix, of monies due to her in that character. Plea, the general issue, the statute of limitations, and a set-off for money lent and advanced, and paid, laid out, and expended by the defendant for the testator's use. On these pleas issues were joined, and at the trial before Lord Tenterden C. J., at the Westminster sittings after Easter term 1826, a verdict was found for the plaintiff on the second issue, and for the plaintiff, also, on the first and third issues, with the damages laid in the declaration, subject to the opinion of the Court upon the following case: — The testator, William

Where A. pur-
chased an an-
nuity for his
life, which was
regularly paid
up to the time
of his death,
but no memo-
rial of the grant
of annuity was
enrolled:
Held, that A.'s
executrix could
not, on that
ground, insist
that the con-
tract was void,
and recover
back the consid-
eration money
paid for the
annuity.

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liam Griffith, in the year 1814, and from that period until the time of his death, resided in and near *Ross*, in the county of *Hereford*. The defendant is an attorney, and during the same period resided at *Monmouth*, and acted as the attorney and agent of the testator. On the 25th day of *November* 1814, *William Griffiths* contracted and agreed to purchase of the defendant an annuity of 24*l.*, for the life of him (*William Griffiths*) for the price or sum of 300*l.*, which was then paid by him to the defendant; and thereupon the following instrument was signed by the defendant to secure the annuity; this instrument was found amongst *William Griffiths*'s papers, after his decease, and was produced by the plaintiff on the trial:—

“ Received this 25th day of *November* 1814, of Mr. *William Griffiths*, of *Buck Castle*, near *Ross*, in the county of *Hereford*, the sum of 300*l.*, being the purchase-money for an annuity of 24*l.* per annum, to be paid by me, my heirs, executors, or administrators, unto the said *William Griffiths*, during the term of his natural life, by two equal half-yearly payments, on *Midsummer-day* and *Christmas-day* in every year; the said annuity to commence from the 25th day of *December* next, and the first half-yearly payment to be made on the 24th day of *June* next; and the payment of the said annuity to be secured at any time after the expiration of two years, from the 25th day of *December* next, on freehold messuages, lands, or tenements, of equal or greater annual value, if so required by the said *William Griffiths*, on his giving three months' previous notice in writing for that purpose: as witness my hand, *B. Bryan*.”

No memorial of this instrument was enrolled, nor was any other security for the annuity given by the defendant,

ant, or applied for by *Griffiths*. The defendant was able to have given the freehold security, if it had been required. *W. Griffiths* died in the month of December 1823, and from the time of the contract for the annuity to the time of his death, the annuity was regularly paid to him half-yearly by the defendant, and frequently paid in advance. The defendant and *W. Griffiths* were on terms of great intimacy, and the defendant often lent him money, the balance of which has been paid to the defendant, since *Griffiths's* death, by the plaintiff.

The question for the consideration of the Court was, Whether the plaintiff was entitled to recover from the defendant any and what sum in respect of the sum of 300*l.* so paid by the testator to the defendant, and whether the same was subject to any and what deduction in respect of the annuity so paid as aforesaid?

Richards, R. V., for the plaintiff. If the action had been brought by the testator he might have recovered the consideration money, no memorial of the grant of the annuity having been enrolled. The provision of the 53 G. 3. c. 41. s. 1. as to this matter is the same as that in the 17 G. 3. c. 26.; and it has been held in several cases, that where the statute avoids the grant of an annuity, the consideration given for it may be recovered back; *Shove v. Webb* (a), *Scurfield v. Gowland* (b). In those cases, the memorial being defective, had been set aside; here no memorial has ever been enrolled: the parties are, therefore, in the same situation. It will be contended, that the executrix cannot maintain the action, although the testator might have done so. [Bayley J.

(a) 1 T. R. 732,

(b) 6 East, 241.

Here

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Here the testator enjoyed the whole consideration for which he paid his money, the annuity was regularly paid during his life, and you must contend, that if he had received it for thirty years, still the consideration money might be recovered by the executrix.] It is not necessary to contend for so much, for, according to *Hicks v. Hicks* (*a*) the defendant would have a right to set-off the payments made on account of the annuity; and the plaintiff in this case only seeks to recover the balance, after allowing such payments in account. In *Hicks v. Hicks* Lord *Ellenborough* said, that if the consideration money was money had and received, it must be money had and received with all its consequences; now one of those is, that the executrix may recover it.

Cross, contra. This case differs from all those in which the consideration money given for an annuity was recovered back after the grant of the annuity had been set aside. In each of those cases the grant was avoided on the application of the grantor, by his act, therefore, the parties were remitted to their original situation, and the action to recover the consideration money was brought during the continuance of the time for which the annuity was to have been paid. Here the testator had the full benefit of his contract, which, at the time of his death, no longer remained executory, and there is a great difference between executory and executed contracts, the former may be rescinded, the latter cannot, *Tappenden v. Randall* (*b*), *Lowry v. Bourdieu* (*c*), *Aubert v. Walsh* (*d*). The contract in the present instance clearly

(*a*) 3 *East*, 16.(*b*) 2 *B. & P.* 467.(*c*) 2 *Doug.* 468.(*d*) 3 *Taunt.* 277.

cannot

cannot be rescinded, for it is no longer in existence, and the testator in his lifetime had the full benefit of it, which furnishes another argument against this action ; for money had and received is an equitable action, and therefore ought not to be maintainable in a case where the party has fully enjoyed that for which he paid his money.

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Richards, in reply. The principal argument for the defendant is founded upon the distinction between executory and executed contracts, but that does not properly apply to this case, for the act of parliament, coupled with and explained by the case of *Hicks v. Hicks*, shews that there never was a good contract for the annuity, and that the money having been originally paid without a good consideration, was money had and received to the use of the testator, and therefore recoverable by his executrix.

BAYLEY J. This appears to be a clear case on principles both of law and honesty. This is an action for money had and received, and I learned many years ago that such an action could not be maintained, if it were against equity and good conscience that the money should be recovered. Here a bargain was made, and the testator paid a consideration of 300*l.*, and the defendant agreed for that to pay a certain annuity. The testator received the whole of that which he bargained for, and now his representative says that the contract was void from the beginning. Is there any thing like good conscience in the claim ? Then is the contract void ? The act of parliament says, that unless a memorial be duly enrolled, the deed of which no memorial is enrolled shall be void ; but in many cases such words have been held to make the

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the instrument voidable only at the will of the party, and I think we are at liberty to put that construction upon them in the present case. It is said that the statute, as explained by *Hicks v. Hicks*, shews the contract to have been void. But *Hicks v. Hicks* was very different from the present case. There the grantor of the annuity insisted that the contract was void, the grantee was therefore at liberty to contend for the same thing, and the only point ruled was, that the grantor had a right to set off the payments which he had made on account of the annuity, in an action brought by the grantee to recover back the money. On these grounds I think that the action cannot be maintained.

HOLROYD J. I think that the arguments already stated are sufficient to prove that the present action cannot be maintained. Where the grantor of an annuity avoids it on the ground of non-compliance with the statute, the grantee also has a right to treat it as void and to recover back his money, and there is a great difference also where the grantee still has power to avoid the annuity. But here the contract has been fully executed as in *Andree v. Fletcher* (a), and there are many strong cases respecting illegal wagers, where it has been held that money actually paid over cannot be recovered back.

LITTLEDALE J. concurred.

Judgment of nonsuit.

(a) 2 T. R. 161. 3 T. R. 266.

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M'INTOSH *against* R. SLADE, J. SLADE, and
C. VOY.

THIS was an action on the case brought to recover damages for the injury sustained by the plaintiff, in consequence of his barge, called the *Smelt*, being run foul of and sunk in the river *Thames* by the brig *Stanley*, of which the defendants *R. Slade* and *J. Slade* were the owners, and the defendant *Voy* was the pilot at the time of the accident. At the trial before Lord *Tenterden C. J.* at the *London* sittings after last *Michaelmas* term, a verdict was found against all the defendants, subject, as to the liability of the defendants *R. Slade* and *J. Slade*, to the opinion of this Court on the following case: —

The brig *Stanley*, belonging to the port of *Poole*, of which the two defendants, *R. Slade* and *J. Slade* were the owners, sailed from *Lisbon* in *February 1826*, with a cargo of fruit and wine for the port of *London*, and by the bills of lading the fruit was to be delivered at *Fresh* wharf or *Coxe's* quay, both in *Thames Street*, and the wine was to be delivered in the *London* docks. The brig was navigated from *Gravesend* to the *London* docks by and under the charge of *J. Pashley*, a duly licensed pilot, and arrived in the *London* docks on the 21st of *February 1826*, where *Pashley* was dis-

The master of a vessel bound on a voyage from *Lisbon* to *London* with a cargo of fruit and wine, the former, which was stowed above the wine, being deliverable at *Coxe's* quay, which is higher up the river *Thames* than the *London* docks, where the wine was deliverable, put into the *London* docks, and while there, applied to the consignees of the fruit to allow the same to be landed there, but they refusing, the vessel proceeded from the *London* docks towards *Coxe's* quay, under the charge of a pilot duly licensed for that purpose, and while under his charge, ran foul of a barge and sunk it. In an action brought

by the owners of the barge: Held, that the vessel, not having reached the place at which she was to commence the delivery of her cargo, her removal from the *London* docks to that place was not a change of mooring within the statute 6 G. 4. c. 125. s. 63., and that the master, therefore, was bound by law to have a pilot on board her at the time when she ran foul of and sunk the barge, and, consequently, the owners were discharged from responsibility.

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charged, and the brig remained in the *London* docks until the 25th of the same month of *February*. During the time the brig was so lying in the docks, application was made to the consignees of the fruit, to allow the same to be discharged in the docks, which was refused, and no part of the brig's cargo was discharged in the docks, nor did she break bulk there. On the 25th of *February* the brig proceeded from the *London* docks towards *Coxe's quay*, in *Thames Street*, for the purpose of discharging the fruit, which constituted the upper part of her cargo, and there delivered the same according to the bill of lading. The defendant *Voy*, a pilot duly appointed and licensed to conduct ships and vessels from *London Bridge* to *Gravesend*, and from *Gravesend* to *London Bridge*, was employed by the defendants, *R. Slade* and *J. Slade* as such pilot, to conduct and navigate the brig from the *London* docks to *Coxe's quay*; and whilst she was proceeding from the *London* docks to *Coxe's quay* with *Voy* on board, and under his charge and management, the accident in question happened. *Coxe's quay* is situate between *London Bridge* and the *London* docks, and is about a mile from the *London* docks. The port of *London* extends from *London Bridge* to below *Gravesend*. The question for the opinion of the Court was, whether under the above circumstances the defendants *R. Slade* and *J. Slade* were or were not entitled to be acquitted under the provisions of the pilot act 6 G. 4. c. 125. the vessel being under the care of a duly licensed pilot at the time of the accident.

Wightman for the plaintiff. The statute 6 G. 4. c. 125. s. 55. enacts, that no owner or master of any ship shall
be

be answerable for any loss or damage which shall happen to any person from or by reason or means of any neglect, default, or incapacity of any licensed pilot acting in the charge of any ship under or *in pursuance of any of the provisions of that act*. The question in this case is, whether the pilot, at the time when the accident happened, was acting in this vessel in pursuance of any of the provisions of the act. If the master was bound by the act of parliament to take a pilot to remove the vessel from the *London* docks to *Coxe's quay*, then the owners are not liable. But if he was not bound to take a pilot, and took one voluntarily, then the pilot is considered as a servant of the owners, and they are responsible for his negligence, *Carruthers v. Sydebotham* (a), *Attorney General v. Case* (b), *Abbott on Shipping*, 160. 5th edit. The master was not bound to take a pilot to remove the ship from the *London* docks to *Coxe's quay*; the voyage was at an end when the vessel reached the *London* docks. Section 2. of this statute enacts, "that all vessels sailing, navigating, and passing up or down or upon the rivers *Thames* or *Medway*, and the several channels, creeks, and docks thereof or therein, between *Orfordness*, the *Downs*, or *Isle of Wight*, and *London Bridge*, shall be conducted and piloted (except as thereafter provided) within those limits by licensed pilots, and by no other pilots or persons whomsoever." But this enactment only applies to ships in the course of their navigation, and not to ships arrived at their final port of destination, and which are removed from one part of such port to another, after the voyage is ended, *Rex v. Lambe* (c), *Rex v. Neale* (d).

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against
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(a) 4 M. & S. 77.
(c) 5 T. R. 76.

(b) 3 Price, 502.
(d) 8 T. R. 241.

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The sixty-third section of the 6 G. 4. c. 125. contains an express exception as to ships brought into any port in *England* by any pilot duly licensed, afterwards removing in such port or ports for the purpose of entering into or going out of any dock, or for changing the moorings of such ship or vessel. Here the ship had arrived at the *London* docks, where part of the cargo was to be discharged, and where the master expected that the whole would be discharged. The docks are of considerable extent, and parts of the cargo may be discharged at different wharfs: surely it could not have been intended by the legislature that a licensed pilot should be required to move the vessel from one part of the dock to another. The schedule to the act contains the rates of charge to be made by pilots upon ships to the *London* docks or to moorings, as well as from moorings into the *London* docks. But there is no rate from the *London* docks to a place nearer the bridge, nor from moorings to moorings. The removing of the vessel from the docks to a mooring in another part of the port is a change of mooring. In *Thornton v. Boland*(a), which will be cited on the other side, the vessel while on a voyage from the *Mediterranean* to *London* sailed from *Standgate Creek* for the space of a mile, on her voyage towards *London*.

Campbell contrà. The owners were compelled by law to take a pilot to navigate the vessel from the *London* docks to *Coxe's* quay. Secondly, if they were not bound to do so, they are exempted from responsibility, because

(a) 2 *Bingh.* 219.

they

they had a pilot on board the vessel at the time when the accident happened. The voyage was not at an end; the ship at the time when the accident happened was sailing to her place of destination; for by the bills of lading the fruit was to be delivered at *Coxe's quay*, and from the manner in which the cargo was stowed, it was absolutely necessary that the fruit should be first discharged. The port of *London* extends from *London Bridge* to *Gravesend*. Suppose the vessel had stopped at *Gravesend* without breaking bulk, could it have been contended that she might afterwards proceed up the river without a pilot? and there is no difference in principle between such a case and the present. Suppose the accident had happened while she was sailing between the *London* docks and *Coxe's quay*, without having stopped at the docks, it is quite clear that she must have had a pilot. The accident having happened, therefore, while she was sailing and navigating upon the *Thames* in the course of her voyage to her place of destination, the owners were bound by the words of the second section to have a pilot on board. *Rex v. Lambe* (*a*), and *Rex v. Neale* (*b*), were decided on the statute 5 G. 2. c. 20. The words of that statute are very different from those used in the statute 6 G. 4. c. 125. s. 2. Then assuming this to be a case within section 2., does it fall within the excepting clause in section 63.? That exempts from the obligation to take pilots the master of any vessel brought into port afterwards removing such vessel for the purpose of entering into or going out of any dock, or for changing the moorings of such vessel. At the time

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(*a*) 5 T. R. 76.(*b*) 8 T. R. 241.

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when the cause of action arose, the vessel was not removing for the purpose of entering or going out of any dock, or for changing her moorings. But she was proceeding on her voyage to her place of destination, for the purpose of discharging her cargo. The case of *Thornton v. Boland* (*a*) is in point. The question in that case arose on the twenty-second section of the 52 G. 3. c. 39., the words of which are the same as those in the sixty-third section of the 6 G. 4. c. 125.; and it was held that the vessel, having proceeded a mile from *Standgate Creek* towards *London*, ought to have had a pilot. Here the vessel was proceeding from one part of the port of *London* to another, which was her place of destination. But, assuming that the owners of the vessel were not bound by law to take a pilot, still having had a pilot on board, they are exempted from responsibility. Section 55. is general, and exempts owners from responsibility for any damage accruing by default of any licensed pilot acting in the charge of any vessel in pursuance of the provisions of that act, so long as such pilot shall be duly qualified to have the charge of the vessel. Here the pilot was duly qualified to have charge of the vessel in her passage from the *London* docks to *Coxe's quay*. He was, therefore, acting in the charge of the vessel in pursuance of the provisions of the act; *Carruthers v. Sydebotham* (*b*), and *The Attorney-General v. Case* (*c*); and the inference drawn from those cases in *Abbott on Shipping*, p. 160., do not apply, because those cases turned on the *Liverpool* act, which is differently worded from the statute 6 G. 4. c. 125.

Cur. adv. vult.

(*a*) 2 *Bingh.* 219.

(*b*) 4 *M. & S.* 77.

(*c*) 3 *Price*, 302.

BAYLEY

1827.

 M^r. IRVING
 against
 SLADE

BAYLEY J. (a) This was an action against the owners and pilot of a brig, for an injury done by the brig whilst moving from the *London* docks to *Coxe's* quay, and the question was, whether, under the late pilot act, 6 G. 4. c. 125., the owners were entitled to an acquittal? There was no question but that the injury was occasioned by the neglect or default of the pilot; so that the owners were clearly entitled to an acquittal, under the fifty-fifth section of that act, if, under the circumstances, it was necessary that the brig should have a pilot on board at the time; but it was insisted that the protection under section 55. extended to no case where the ship was under no obligation to have a pilot on board; and it was contended, that at the time this injury was done this brig was under no such obligation. It is upon this latter point our opinion is founded, and we have had the benefit of conferring with Lord *Tenterden* upon the subject. By this act, all ships and vessels navigating and passing up or down *or upon* the rivers *Thames* or *Medway*, and the several channels, creeks, and docks thereof or therein, between *Orfordness*, the *Downs*, or *Isle of Wight*, and *London Bridge*, are to be conducted and piloted within those limits (except as thereafter is provided) by licensed pilots, and no other pilots or persons; and the only exception applicable to this case was section 63., which gave an exemption from penalties for removing a ship in port, for the purpose of entering into or going out of any dock, or for changing its moorings; and it was urged in this case, that at the time in question this brig was merely changing her moorings. The brig was loaded with fruit and wine, the former deliverable at *Fresh* wharf or

(a) The judgment of the Court was not delivered till *Trinity* term.

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against
SLADE.

Coxe's quay, both in *Thames Street*, and considerably above the *London* docks, the latter deliverable in the *London* docks. The fruit constituted the upper part of the cargo, and the wine could not be delivered until the fruit was out; so that unless the owners could come to some new arrangement with the persons who were to have the fruit, *Fresh* wharf or *Coxe's* quay was the place to which the ship should in the first instance have proceeded, and they had no right to stop her short of one or the other of these places. It was thought fit, however, to put into the *London* docks, and stop short there, under the chance that they might be able to come to some arrangement with the consignees of the fruit, to procure their consent for discharging the fruit there; and upon being disappointed in that respect they got a fresh pilot, left the docks, and were proceeding to *Coxe's* quay when the injury for which the action was brought was committed; and, under these circumstances, we are of opinion that this brig was not to be considered as merely changing her moorings. It is not necessary for us to decide, whether, where a ship's cargo is deliverable at different parts of the port of *London*, and a removal becomes necessary after she has reached the place where she is first to begin her delivery, such removal shall be deemed a change of mooring; but our opinion is this, that if a ship stops short before she reaches the place at which she ought to stop, a removal thence to the place to which she ought to have gone in the first instance is not a mere change of mooring, and is not within the exemption in question. This brig had no right to stop at the *London* docks; she ought to have proceeded, in the first instance, to *Fresh* wharf or *Coxe's* quay; and when she was proceeding thither from the docks she was going to what was, properly, her original destination

ation — she was sailing to reach what was her journey's end, and not merely changing her moorings. For these reasons, we are of opinion that the master was bound, at that time, to have a pilot on board, and, consequently, that the owners are exempt from liability. The verdict, therefore, must be entered for *Robert and John Slade*, and against *Voy*.

1827.

M'INTOSH
against
SLADE.

The KING *against* The Inhabitants of RIDGWELL,
in the County of ESSEX.

UPON appeal against an order of two justices, whereby *G. Aylen* and his wife were removed from the parish of *Ridgwell*, in the county of *Essex*, to the parish of *Ashen*, in the same county, the sessions quashed the order, subject to the opinion of this Court on the following case :

At the trial of the appeal, the respondents proposed to establish a derivative settlement for the pauper, *G. Aylen*, from his father, *J. Aylen* the younger, by proving that the father was settled by estate in the appellant parish of *Ashen*, and for that purpose offered in evidence an instrument which had been originally written on unstamped paper, but which for the purposes of the appeal had been stamped with a 20s. agreement stamp, and a fine of 5*l.* paid at the stamp office on procuring such 20s. stamp to be impressed thereon. The instrument was in the following words : “ An agreement made the 20th day of February 1805, between *Joseph Aylen*, of *Ridgwell*, in the county of *Essex*, blacksmith, of the one part, and *Joseph Aylen* the younger, of the same, blacksmith, of the other part, as follows : the said *Joseph*

Where an instrument, which, in terms, purported to be conveyance of land, but which, not being by deed, could not operate as such, contained a stipulation not to disturb the party intended to take the premises, in the enjoyment of them, was held to operate as an agreement, and to require a stamp appropriate to such instrument.

Aylen

1827.

The KING
against
The Inhabit-
ants of
RIDGWELL.

Aylen the elder, in consideration of the natural love and affection which he has and bears to his son, *Joseph Aylen*, and for the further consideration of the sum of 19*l.* 19*s.* of lawful money of *Great Britain*, does fully, clearly, and absolutely remise, release, and for ever quit claim unto his son, *Joseph Aylen*, the full and peaceable possession of, in, or to all that moiety or two thirds of a tenement or cottage situate in *Ashen*, otherwise *Esse*, together with the yards and premises and appurtenances thereunto belonging, to hold all the said moiety or two thirds of the aforesaid messuage or tenement, with the hereditaments and appurtenants to the same belonging, to my said son, *Joseph Aylen*, and to his heirs and assigns absolutely and for ever; and I the said *J. Aylen* the elder, nor my heirs nor any other person or persons for me or them, or in my or their names, or in the right or stead of any of them, shall or will, by any ways or means hereafter, have, claim, challenge, or demand any estate, right, title, or interest, be it by last will or testament or otherwise, of, in, or to the said premises, or any part or parcel thereof, but from all and every action, right, estate, title, interest, or demand of, in, or to the said premises, or any part thereof, they and every of them shall be utterly excluded and barred for ever." The execution of the instrument was duly proved, but the appellant's counsel objected to its admissibility in evidence on the ground that it had not a proper stamp, whereupon the court of quarter sessions decided that it could not be received in evidence, and on that ground quashed the order of removal, subject to the opinion of this Court, whether it was admissible in evidence for the purpose of proving a derivative settlement for the pauper in the parish of *Ashen*.

Knox

1827.

The King
against
The Inhabit-
ants of
Rmowell.

Knox and Mirehouse in support of the order of sessions. The question in this case arises on the statute 44 G. 3. c. 98., which requires that every "deed, instrument of conveyance," &c. shall have a stamp of 1*l.* 10*s.* Whatever may be the specific denomination of this instrument, it cannot be denied that it was intended by the party who executed it, and understood by the party who took possession under it, as an "instrument of conveyance." That it was so intended, and not meant as an agreement to convey, or to do any future act, is evident upon the face of it. There are many cases bearing upon this point, where the question has been, whether certain instruments operated as agreements for leases, or as leases. However nice the distinctions may be in the earlier cases upon this subject, the rule now adopted, as laid down in *Poole v. Bentley* (a), is, "that the intention of the parties, as declared by the words of the instrument, shews whether it was meant as an agreement for a lease, or as a lease." Here, then, there is nothing executory. A present interest passed by it. The words, "I do fully, clearly, and absolutely remise, release," &c. are words employed in a release, and the concluding part would receive effect as a covenant to stand seised to uses had the instrument been under seal. The parties acted upon it as an "instrument of conveyance," and as such, the case finds that it was offered as evidence of title by the respondents to shew a settlement by estate. Inartificially as this instrument is expressed, it cannot be said that it does not declare distinctly what the parties intended by it. It cannot be contended, that because "instrument of con-

(a) 12 East, 168.

veyance"

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ants of
Ridgwell.

veyance" is enumerated in the act among specialties, it is only to bear a stamp of 1*l.* 10*s.* when it has all the requisites of a specialty. That point has been decided in *Goodtitle v. Way* (*a*). There, a paper writing not under seal purporting to be a lease, was offered as such in evidence, and rejected because it was not stamped as a lease. It was argued, that the word "lease" was inserted in the stamp-act then in operation among other instruments that were all specialties, and therefore a lease was not intended to be included unless by deed; but the Court ruled that the stamp was an improper one, the object of the legislature being merely to raise a revenue from certain things enumerated, and there being no reason why one of the things should be charged rather than another. The document in question was one of those things, and under the present stamp-act should, as an "instrument of conveyance," have been impressed with a stamp of 1*l.* 10*s.*, and the Court below therefore did right in rejecting it. It need not be inquired what effect a court of law would give to this instrument, though it may be observed, that the statute of frauds requires only that instruments to convey lands should be *signed*. It is sufficient that the party executed this instrument as an instrument of conveyance, and that it was tendered as such at the hearing of the appeal.

Jessopp and Dowling contrâ. This paper-writing was not an "instrument of conveyance;" for, whatever might be the intention of the parties, it wanted the legal requisites of an instrument of conveyance, in not being under seal. It might be taken as a nullity, and

(*a*) 1 *T. R.* 735.

totally

totally inoperative, when it would have required no stamp of any denomination; or as an agreement, when the stamp affixed to it would be the proper one. It was offered in evidence to prove under what circumstances the pauper's father had been in possession of the premises in *Ashen*, and was not offered as a conveyance. Whatever might be the effect of this instrument is immaterial on this occasion, the respondents contending only that it ought to have been received in evidence.

1827.

The King
against
The Inhabit-
ants of
Rowell.

BAYLEY J. Whether the stamp of 1*l.* was the appropriate stamp for this instrument depends on the legal effect of the instrument itself. The stamp-act now in force imposes a duty of thirty shillings on every deed or other instrument of conveyance, surrender, lease, release, grant, appointment, confirmation, assignment, transfer, covenant, or any other obligatory instrument (not otherwise charged in the schedule) which may be enrolled." This is not a deed, because it is not under seal. It purports to operate as a conveyance of land, but it cannot so operate, because it is not a deed. It is not, therefore, a release, grant, &c. Then the only question is, does it fall within the other words, "any obligatory instrument (not otherwise charged)?" In what respect is this an obligatory instrument? It does not divest the father of his interest in any portion of the land which it purports to convey. There is one clause by which the father stipulates not to claim any estate or interest in the premises which the instrument purports to convey, and I think that that operates as an agreement by the father not to disturb the son in the enjoyment of the premises. This instrument does not operate as a conveyance

1827.

The King
against
The Inhabit-
ants of
BROCKWELL.

conveyance of the land, but merely by way of agreement. The stamp affixed to it, therefore, was the proper one; and that being so, it ought to have been received in evidence, though, as it does not operate as a conveyance of any interest in the land, it will not advance the case of the respondents. The case must, however, go down to the sessions to be reheard.

HOLROYD J. This instrument purports to operate as a release. Supposing it could so operate, independent of other circumstances, as it would if it were by deed, it ought to have had a release stamp, but when it depends on other circumstances whether it could operate as a release or not, it does not require a release stamp. Assuming that this could be considered as a lease in writing, not under seal, yet if it operated as a lease, it ought to have been impressed with the stamp proper for a lease. Here the instrument, not being under seal, could not *per se* operate as a release of any interest in land. It could operate as an agreement only not to molest the son in the enjoyment of the premises; and having an agreement-stamp, I think it was admissible in evidence, not as an instrument conveying any estate or interest in land, but as an agreement by the father not to disturb the son in the possession of the premises.

LITTLEDALE J. This instrument operates as an agreement, or not at all. It clearly does not convey any legal or equitable interest in the land. If it were not for the clause by which the father binds himself not to disturb the son in the enjoyment of the premises, perhaps it would not require any stamp whatever. That clause

clause makes it operate as an agreement, and as such I think it was admissible in evidence.

Case sent back to the sessions to be reheard. (a)

(a) The order of removal was confirmed at the following sessions, when the respondents shewed a derivative settlement from the pauper's grandfather in *Ashen*, and did not find it necessary, therefore, to offer this paper in evidence to establish his father's.

1827.

The King
against
The Inhabit-
ants of
RINGWELL.

MILNES against DUNCAN, Gent., one, &c.

ASSUMPSIT for money had and received. Plea, general issue. At the trial before Lord *Tenterden* C. J. at the *Middlesex* sittings, after *Trinity* term, 1826, a verdict was found for the plaintiff for 150*l.*, subject to the opinion of this Court on the following case :

The plaintiff, who was an attorney, resident at *Matlock* in *Derbyshire*, was employed by the defendant, an attorney, resident in *London*, to receive the rents of an estate belonging to the defendant, situate near *Matlock*. In the course of this employment the plaintiff, on the 11th *February* 1826, having previously received from the tenants of the estate more than the sum of 150*l.*, he inclosed in a letter of that date, to the defendant, the following *Irish* bill of exchange for 150*l.*, in part liquidation thereof : —

A bill of ex-
change was
drawn in
Ireland upon
the stamp re-
quired by law,
which was less
in amount than
the stamp re-
quired for such
a bill drawn in
England; but
there was no-
thing on the
face of the bill
to shew that it
had been drawn
in *Ireland*.
The holder in
England ne-
glected to pre-
sent it for pay-
ment, and held
it a month after
it was due.
The acceptor
having become
bankrupt, the
holder applied
for payment to
the indorser who had paid it to him. The latter refused to pay it, alleging that the holder had made it his own by his laches. The holder then threatened to sue him, alleging that the bill was void, on the ground that it was drawn on an improper stamp. The indorser inspected the bill, and finding that the stamp was not that required for a bill of the same amount drawn in *England*, but ignorant of the fact that it had been drawn in *Ireland*, paid the amount to the holder: Held, that this was money paid in ignorance of the fact, and there being no laches imputable to the party who paid the money, he might recover it back in an action for money had and received.

£150.

1827.

MILNES
against
DUNCAN.

£150. " *Glen Anne Mills, Nov. 24th, 1825*

Three months after date pay to our order 150*l*
sterling, in *London*, value received.

Mr. Gerald Atkinson,
Liverpool.

Atkinson, Chenney
and Atkinson.

The bill had several indorsements, but there was nothing in those indorsements to shew that the bill had been drawn or indorsed in *Ireland*. On the 13th of *February* the Defendant acknowledged the receipt of the bill. The bill became due on the 27th of *February*, but was not then presented for payment; and upon the 20th of *March* the defendant wrote the following letter to the plaintiff: "I am sorry to acquaint you that the bill for 150*l.* you sent me for the rent has not been honoured. This bill is drawn by or in the name of *Atkinson* and two other names from some mills, but the writing is so bad that I cannot make the name or the place out: what am I to do in this?" The plaintiff received this letter on the following day, and on the same day applied to his immediate indorsers, Messrs. *Arkwright and Co.*, bankers at *Wirksworth*, to take up the bill, which they refused to do, because it had been so long overheld. On the same day the plaintiff wrote to the defendant, and informed him he had received the bill for 150*l.* from his bankers, *Arkwright and Co.* of *Wirksworth*, and since the receipt of the defendant's letter had applied to them or the subject of it, and they refused to pay it on the ground that it had been so long overheld. On the 25th of *March* the defendant wrote to the plaintiff, and said, it was unnecessary for him (defendant) to enter on the subject of supposed delay, as the bill was an absolute nullity, by being drawn on a stamp of inferior value;

and

and he requested the plaintiff, with as little delay as possible, to remit him the amount of the rent, in which case he would return the void bill. To this the plaintiff, on the 27th of *March*, replied, that he had again applied to *Arkwright and Co.*, and they had refused to have any thing to do with the bill, because it had been overheld for so long a time, and that he, the plaintiff, had directed his agent, Mr. *Forbes*, to call upon him, defendant, and confer with him on the subject, and requested him to shew *Forbes* the bill. A clerk, by the direction of *Forbes*, called on the defendant on the 29th of *March*, and after inspecting the bill, said it was drawn on a 4*s.* stamp. On the 30th the defendant wrote to the plaintiff and informed him that he declined presenting the illegal bill of exchange to any person for payment, because he might thereby subject himself to a penalty as the other parties on the bill had; and that if his (plaintiff's) bankers still obstinately refused to have any thing to do with the illegal bill, he should resort to other means; and as his determination was formed, it would be better to act on it immediately, and therefore desired the plaintiff to inform him in the course of a post or two if he (plaintiff) would instruct *Forbes* to appear for him. Upon the 3d of *April*, *Forbes's* clerk, by the plaintiff's direction, again called upon the defendant, and informed him that he had written to the plaintiff, and expected to receive the amount of the bill in a post or two, until which time he requested no proceedings should be taken; and on the 7th *April*, the same clerk, by the direction of *Forbes*, paid the amount of the bill, and at the time of so paying it, a second time saw and inspected the bill, which the defendant delivered up to him, and gave the following receipt: "7th *April* 1826, received of *James Milnes*,

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Y y

Esq.,

1827.

MILNES
against
DURCAM.

1827.
—
**MILNES
against
DUNCAN.**

Esq., by the payment of Mr. *Forbes*, his agent, two bank post bills, value 150*l.*, for a void bill of exchange sent to me by Mr. *Milnes* for rent." Up to this period the bill in question had been considered and treated by both parties as an *English* bill, but it afterwards turned out to be an *Irish* bill, and impressed with a proper stamp suitable to such bill. Upon the discovery of which, on the 12th of *April*, the plaintiff presented the bill at Messrs. *Williams* for payment, which was refused by them. But if it had been presented when it became due, there were at that time assets in their hands, and it would have been paid. The acceptor became bankrupt on the 20th of *June* 1826, which was after the present action had been commenced.

Coleridge for the plaintiff. The money sought to be recovered in this action was not paid under any mistake of the law, but under a mistake of the real facts. That mistake of the plaintiff was occasioned in the first instance by the defendant himself, at a time when by his own laches he had made the bill his own. There has been no consideration for the money, and no intention to give it without consideration. Nor has there been any delay on the plaintiff's part in making his claim, so as to alter the defendant's situation in relation to the other parties. Upon general principles, therefore, the money may be recovered. It is an established principle that money paid under a mistake of the law cannot be recovered back; but there is another principle also established by decided cases, that where it is against conscience in the party receiving money to retain it, or where the payment is made in ignorance of the facts, and there

there is no illegality in the transaction, an action will lie to recover it, *Moses v. Macfarlane* (*a*). The same principle is recognised in *Bize v. Dickason* (*b*), and by *Mansfield C. J.* and *Chambre J.* in *Brisbane v. Dacres* (*c*). Then is it against conscience for the defendant to retain the money? On the 17th of *February* he received a good bill fourteen days before it was due, and without having any idea of its being void, he neglected to present it for payment when due. By his negligence it became as against all prior indorsers waste paper. He was told so, and that the indorsers would not hold themselves liable. On the 25th *March*, he, having the bill in his possession, made a statement false in fact, that the bill was on an improper stamp, and on the 29th relied upon that circumstance as a ground for refusing to present it for payment, and threatened to sue the plaintiff, and thereby induced him to pay the money, which he (defendant) had no right in conscience to receive. The defendant at that time either knew the bill to have been drawn in *Ireland*, or he believed it to have been drawn in *England*. If he knew the bill to have been drawn in *Ireland*, the money was obtained by fraud. If he believed it to have been drawn in *England*, how can he profit honestly by the same mistake in another into which he had first fallen himself, and then led that other?

Comyn contra. The money was paid by the plaintiff at a time when he had full means of knowledge of the facts, and that being so, it cannot be recovered back, *Bilbie v. Lumley* (*d*). Lord *Ellenborough* in that case

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(*a*) 2 *Burr.* 1005.(*b*) 1 *T. R.* 285.(*c*) 5 *Trant.* 145.(*d*) 2 *East*, 469.

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treats *Chatfield v. Paxton* (*a*) as a decision not to be relied upon. When the plaintiff was informed that the stamp was improper, it became his duty, before he paid the money claimed, to use due diligence to ascertain whether it was so or not, and for that purpose he ought to have inquired where the bill was drawn. He had received the bill, and had opportunities not only of inquiring of the person from whom he received it, but of tracing it through the different indorsers up to the drawer; and if he had done so, he would have discovered that it was drawn in *Ireland*, and had a proper stamp.

Coleridge in reply. The decision in the case of *Bible v. Lumley* (*b*) does not go to the extent that money paid by a person with full means of knowledge of the facts may be recovered back, although it is so stated in the marginal abstract of the case. At Nisi Prius the case was argued by the plaintiff's counsel as if the payment had been made under a mistake of law, and Lord Ellerborough in banc assumed as the ground of his decision that the party had a full knowledge of all the facts of the case; and Lawrence J. cited it as an authority to that extent only in *Lothian v. Henderson* (*c*), and it was so treated by the counsel and the Judges in *Brisbane v. Dacres*. It has never been decided that money paid under ignorance of the facts, but with means of knowledge, may not be recovered back. The principle of the rule is comprised in the maxim *volenti non fit injuria*. Every man is presumed to know the law, and if knowing the fact also, he chooses to make a payment, that becomes a gift which it is not contrary to good conscience

(*a*) Cited by Gibbs J. in *Brisbane v. Dacres*, 5 *Tount.* 155.

(*b*) 2 *East*, 469.

(*c*) 3 *B. & P.* 520.

for the donee to retain, but is so for the donor to seek to recover. But this maxim does not apply to a case where money is paid under ignorance of the fact. It will be said that as knowledge of the law is to be presumed, so ought knowledge of the facts where there are means of knowledge. The former, however, is a presumption of law founded on reasons of public policy, against which no proof is available. The latter is a presumption of fact always to be rebutted by evidence, and here rebutted.

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BAYLEY J. I am of opinion that the plaintiff is entitled to recover. There is no doubt as to the rule of law applicable to this case. If a party pay money under a mistake of the law he cannot recover it back. But if he pay money under a mistake of the real facts, and no laches are imputable to him (in respect of his omitting to avail himself of the means of knowledge within his power), he may recover back such money. In this case the question is, whether there was, on the part of the plaintiff, at the time when he made the payment, ignorance of the true state of the facts, or any negligence imputable to him, in not availing himself of the means of knowledge within his power? The bill was remitted to the defendant before it was due. He neglected to present it for payment when due, and held it a month. In consequence of that neglect the bill was not paid. Assuming that there was no defect in the bill which rendered it void, but that it was a valid bill, the negligence of the defendant destroyed all right of the plaintiff to recover against the prior indorsers. The situation of the parties was varied by this negligence of the defendant. On the 20th of *March*, long after the bill became due, he communicated to the plain-

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tiff that the bill had not been paid. At that time the defendant does not appear to have been aware of any infirmity in the bill. The plaintiff apprised Arkwright and Co. of this, and they refused to pay, on the ground that the bill had been held over. The defendant then, for the first time, insisted that the bill was void, on the ground that it had an improper stamp, and he refused to present for payment what he called the illegal bill. It is quite clear that the defendant at that time thought the bill was improperly stamped. The circumstance of his being misled is very strong evidence to shew that the bill itself did not supply to the holder adequate means of knowing whether it was properly stamped or not. Payment of the amount of the bill was made by the plaintiff, under the impression that the bill was void. That may be collected from the receipt, which states the payment to have been made in respect of a void bill of exchange. The defendant accepted the money, on the supposition that the bill was void. It afterwards turned out that the bill was drawn in *Ireland*, that it had an appropriate stamp, and, consequently, was a valid bill. The money was therefore paid to and received by the defendant, under a mistake as to a particular fact, viz. the place where the bill was drawn. Then are any laches imputable to the plaintiff? If it had appeared on the face of the bill to have been drawn in *Ireland*, there would perhaps have been laches on his part in making the payment, under an idea that the bill was drawn in *England* and had an improper stamp, when he might by due inquiry of the prior indorser have learned that the bill was drawn in *Ireland* and was a valid bill. But neither the date nor the indorsements were calculated to raise in the mind of any person who saw the bill any suspicion that it was drawn in *Ireland*. All the circumstances were

as much calculated to give knowledge to the defendant as to the plaintiff: they did not convey to the defendant or the clerk of Mr. *Forbes* any knowledge that the bill was drawn in *Ireland*. We may fairly conclude, therefore, that they did not afford adequate means of knowledge. It seems to me, that the plaintiff, at the time when he made the payment, had no adequate means of knowing that the bill was not a void bill; and that being so, it is quite clear that this money was paid under a mistake of fact, and without any laches on the part of the plaintiff, and for these reasons I think he is entitled to recover it back.

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HOLROYD J. I am of the same opinion. In the course of the argument I have entertained some doubts, on the ground that the payment was made and submitted to as matter of right after inspection of the bill. If the money had been paid after proceedings had actually commenced, I should have been of opinion that, inasmuch as there was no fraud in the defendant, it could not be recovered back. The defendant puts his right to have the amount paid, on the ground that the bill was void on account of its being on a wrong stamp. That was a mistake of the fact, not of the law, as it would have been if the bill had been drawn in *England* upon a proper stamp. It afterwards turned out that the bill was drawn in *Ireland*, and that the stamp affixed to it was the right one. Then as the plaintiff paid the money under the impression that the bill was drawn in *England*, and therefore on an improper stamp, it was paid under a mistake of a fact, and I incline to think, that, according to the authorities, he may recover it back.

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LITTLEDALE J. The original fault was with the defendant, for he neglected to present the bill for payment when it became due. According to general principles, therefore, the loss ought to fall upon him. The defendant, finding that the indorser refused to pay it, represented to the plaintiff that it was a void bill in consequence of its not having a proper stamp, and threatened to sue him. The plaintiff believing that representation to be true, consented to pay the money, but it was stated in the receipt that he paid it in respect of a void bill. Whether it was valid or not, depended on a fact of which the plaintiff was at that time ignorant, viz. whether it was drawn in *England* or *Ireland*. It is said that he had means of knowing that, for he might have inquired of the prior indorser; but there being nothing on the face of the bill to lead him to suppose that it was drawn in *Ireland*, he was not bound to make any inquiry, and I am of opinion that he is entitled to recover this money, on the ground that it was paid in ignorance of the fact.

Postea to the plaintiff

HUGHES *against* HUMPHREYS and Another.

Covenant by
 the father of an
 apprentice
 against the
 master for not
 teaching and
 providing for the apprentice. Plea, that up to a certain time, defendant did teach, &c., and that then the apprentice, without leave, quitted defendant's service, and never returned. Replication, that on, &c. defendant refused then, or ever, to receive back the apprentice, and thereby discharged him from his service. Rejoinder, that the apprentice enlisted as a soldier, and that plaintiff never requested defendant to receive back the apprentice when he was able to return to the service. Surrejoinder, that soon after the apprentice enlisted, defendant refused then, or ever, to take him back, and wholly discharged him from his service: Held, on demurrer, that the surrejoinder was bad, not being a sufficient answer to the rejoinder, and that the plea was good, as it disclosed a sufficient excuse for non-performance of the defendant's covenant.

part,

part, and defendants, of the third part, defendants did covenant, promise, and agree, to and with the plaintiff, his executors, &c., that they the said defendants would use their best endeavours to teach and instruct *Owen Hughes* in the business and profession of surgery and pharmacy, and all other the branches of the same; and also find and provide for *Owen Hughes* good, sufficient, and suitable meat, drink, and lodging, during the term of five years next ensuing from the day of the date of the indenture. Breach, that defendants did not, nor would after the making of the indenture, use their best endeavours to teach and instruct *Owen Hughes* in the business or profession of surgery and pharmacy during the said term; but, on the contrary thereof, they the said defendants afterwards, and after the making of the indenture, and before the expiration of the term, to wit, on the 5th day of *October*, in the year of our Lord 1825, at, &c., wholly refused then, or at any other time, to teach or instruct *Owen Hughes* in the said business and profession, contrary to the tenor and effect, true intent and meaning of the indenture, and of the covenant of the defendants. Secondly, that the said defendants did not, nor would after the making of the said indenture, find and provide for *Owen Hughes* good, sufficient, and suitable meat, drink, and lodging during the said term; but, on the contrary thereof, afterwards, to wit, on, &c., at, &c., discharged him the said *Owen Hughes* from their employ, and neglected, and then and there wholly refused then or at any other time to receive him in their employ, or to find and provide for him good, sufficient, and suitable meat, drink, and lodging, contrary to the covenant of the said defendants. Plea, that *Owen Hughes*,

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—
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against
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Hughes, after the making of the indenture, and before the expiration of the term of five years in the indenture mentioned, to wit, on, &c., at, &c., without the licence or consent of the defendants, or either of them, wrongfully deserted from and left the service and employ of the defendants, his masters, and did not at any time afterwards return into such service or employ, but hath thence continually hitherto continued absent therefrom; and the defendants further say, that they did continually, from and after the making of the said indenture until the said *Owen Hughes* so deserted and left the service and employ of the said defendants as aforesaid, use their best endeavours to teach and instruct *Owen Hughes* in the business or profession of surgery and pharmacy, and all other the branches of the same; and did also during all that time find and provide for the said *Owen Hughes* good, sufficient, and suitable meat, drink, and lodging, according to the form and effect of the indenture and of the covenant of the defendants in that behalf. Replication to so much of the said plea as relates to the time upon and subsequent to the 5th of October 1825, that after *Owen Hughes* so left the service and employ of the defendants as aforesaid, and during the term in the indenture mentioned, and before the exhibiting of the bill of the plaintiff in this behalf, to wit, on the 5th day of October 1825, at, &c., the defendants wholly refused then or at any other time to receive back *Owen Hughes* into their service or employ as such apprentice, or to use their best endeavours to teach and instruct *Owen Hughes* in the business or profession of surgery and pharmacy, and all other the branches of the same, or to find for *Owen Hughes* good, sufficient, and suitable meat, drink, and lodging, according

cording to the covenant of the defendants, and thereby then and there discharged *Owen Hughes* from their service and employ. Rejoinder, that before the time of the said supposed refusal in the replication to the said part of the said plea of the said defendants mentioned, and before the exhibiting of the bill of the plaintiff in this behalf, to wit, on the 5th day of *October*, in the year of our Lord 1825, at, &c., *Owen Hughes* enlisted and entered in the service of his Majesty as a common soldier, and remained and continued in the service of his Majesty as such common soldier as aforesaid for a long space of time, to wit, hitherto, and was thereby during all that time wholly incapacitated from serving the defendants as such apprentice as aforesaid; and the defendants further say, that the plaintiff did not at any time after *Owen Hughes* so quitted and left the service and employ of the defendants as such apprentice as aforesaid, and before *Owen Hughes* enlisted as such soldier as aforesaid, or at any other time, request the defendants to receive back *Owen Hughes* into their service as such apprentice, when *Owen Hughes* was ready and willing, and capable of returning into such service; nor did *Owen Hughes* tender himself to the defendants, or offer during that time to return into the service or employ of the defendants as such apprentice as aforesaid. Surrejoinder, that a little time after *Owen Hughes* so enlisted and entered into the service of his Majesty as a common soldier, as in the rejoinder of the defendants is in that behalf alleged, to wit, on the 5th day of *October*, in the year of our Lord 1825, to wit, at, &c., the defendants refused then or ever to receive back *Owen Hughes* into their service and employ as such apprentice as aforesaid, and then and there wholly discharged *Owen Hughes* from their said service

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service and employ as such apprentice as aforesaid, and discharged him *Owen Hughes* from returning or offering to return then or ever into the service of the defendants as such apprentice as aforesaid. Demurrer and joinder.

Oldnall Russell in support of the demurrer. The surrejoinder does not traverse or avoid any of the facts alleged in the rejoinder, and those facts are an answer to the replication. The replication states that the defendants, on, &c., refused to receive back the apprentice into their employ, and *thereby* then and there discharged him. The rejoinder shews that the apprentice had incurred a disability to serve in the character of apprentice, and had never returned or offered to return. That, according to the dictum of *Bayley J.* in *Winstone v. Linn* (*a*), is a sufficient excuse for not giving instruction, &c. during the term for which he was bound; and *Cuff v. Brown* (*b*) is also an authority to the same effect. If so, the surrejoinder should have traversed or avoided the matter rejoined. But the plaintiff may contend that the defendants' plea is no bar to the action. It does, however, shew a sufficient excuse for that which is stated as a breach of the covenant of the defendants. The breach is, that defendants refused and neglected to teach or to provide lodging, &c. for the apprentice during the term. The defendants answer, that they did teach and provide for the apprentice up to a certain time, and that then the apprentice quitted their service without leave, and never returned. They could not teach or provide for him if he would not remain with them, and therefore

(a) 1 B. & C. 467.

(b) 5 Price, 297.

his

his absence is an excuse for the non-performance of the covenant.

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Rumball contrà. The surrejoinder is an answer to the rejoinder. It states, that on a certain day the defendants wholly *discharged* the apprentice from returning, or offering to return to their service. That is a continuing refusal, applying to the whole of the residue of the term mentioned in the indenture, and after that the disability of the apprentice was immaterial. If it had been removed the next day, still he would have continued discharged from the service of the defendants. If the surrejoinder had merely alleged a refusal to take back the apprentice, it might have been necessary to aver a readiness and offer to return, *Rawsthorne v. Johnson* (a), *Co. Litt.* 207. But it is here alleged that the defendants wholly discharged him from their service, and that rendered any offer to return unnecessary, *1 Roll. Abr.* 453. *N. pl.* 5., *Jones v. Barkley* (b). [*Bayley* J. In *Co. Litt.* 221. it is laid down, that if there be a feoffment upon condition to be performed before a certain day, and the feoffee incur a disability, the condition is broken, and the feoffor may re-enter although the disability may be removed before the day.] Then the plea does not contain any sufficient answer to the declaration. Two breaches of covenant are assigned, neglecting to teach and neglecting to provide meat, &c. for the apprentice. Neither of these is traversed. The absence of the apprentice is not, in law, an excuse for non-performance. There is an implied covenant on the part of the master that the apprentice shall receive instruction,

(a) *1 East*, 202.(b) *2 Doug.* 684.

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and where a party covenants that something shall be done or accepted by a third person, he is liable to an action for the refusal of that person to do or accept the act, *Com. Dig. Covenant* (L 14.), *Bro. Abr. Condition*, pl. 4., *Lamb's case* (a), *Doughty v. Neal* (b), *Hesketh v. Gray* (c), *Worsley v. Wood* (d). In those cases the act was to be done to, or accepted by a stranger, and therefore they might be distinguishable from this if it had appeared that *Owen Hughes* executed the indenture. That, however, is not averred in any part of the record, and without averment it cannot be intended, *Holkington v. Ascue* (e), *Moor v. Jones* (f), *Ashmore v. Ripley* (g). And in *Branch v. Ewington* (h), and *Cunning v. Hill* (i), it was held that a father who had covenanted that his son should serve as an apprentice, was not exonerated by the refusal of the son, although he was a party to the indenture. The justice of the case is clearly with the present plaintiff, for he cannot compel the apprentice to return to the service, but the masters can.

BAYLEY J. I entirely agree with the principle, that where a covenant is made that a stranger shall do or accept particular acts, that covenant must be performed at the peril of the covenantor. But the first question here is, whether the defendants have covenanted for the performance of those acts on the part of the apprentice, the non-performance of which is urged as a breach of covenant. That must be collected from the nature of the

(a) 5 Co. 24.

(c) *Sayer*, 185.(e) *Cro. Eliz.* 355.(g) *Cro. Jac.* 420.(i) 3 *B. & A.* 59.(b) 1 *Saund.* 216.(d) 6 *T. R.* 710.(f) 2 *Ld. Raym.* 1541.(h) *Doug.* 518.

instru-

instrument, the relation between the parties, and the words that they have used. The declaration describes the instrument as an indenture of apprenticeship; and in such instruments it is usual to find, besides the master and apprentice, some third party to receive and make stipulations on behalf of the apprentice. The case of *Branch v. Ewington* shews what the situation of such third person is: he is not a stranger to the apprentice, but identified with him. There the parties were the master, the apprentice, and his father. The master covenanted to teach, the apprentice to serve, and the father to provide clothing; and each party bound himself to the other for the performance of all the covenants in the indenture. The apprentice having absented himself, the father was sued and held liable. Why might it not have been urged as an answer to that action, that it was the duty of the master to compel the apprentice to stay and serve, if that were the true meaning of the indenture? The plea in this case states, in effect, "I did perform the covenants as long as the apprentice gave me an opportunity of doing so;" and I am of opinion, that the master did not covenant, that the apprentice should stay and learn, and that, consequently, he is not liable for the alleged non-performance of the covenants to teach and provide for him. On the contrary, the stipulation for the service of the apprentice rather comes from the plaintiff. If, then, the plea is good, the subsequent pleadings are bad. The replication states a refusal by the defendants to take back the apprentice, and that they *thereby* discharged him. In answer they say, that another relation had been contracted by the apprentice which took away his power to return. In answer to that, and in order to make the

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masters liable for not taking him back, at all events an offer to return should have been alleged.

HOLROYD J. I think that the defendants' plea in this case is good, and that the subsequent pleadings to avoid it are bad; the defendants are, therefore, entitled to judgment. I agree with the cases that have been cited as to the performance of covenants to or by strangers, but in this case *Owen Hughes* is not a stranger. It is true that the execution of the indenture by him and the plaintiff is not averred, but they are stated to be parties to the deed. In the case of indentures of apprenticeship, the master and apprentice are in opposite relations, and there is generally some third person making stipulations on behalf of the latter. The intent of the instrument is, that the master shall do his best endeavours to give instructions, and the apprentice, by himself, or a third person for him, covenants that he will accept instruction.

LITTLEDALE J. I am entirely of the same opinion. *Owen Hughes* was put apprentice to the defendants, and they covenanted to use their best endeavours to instruct him; but when the apprentice absented himself, it became impossible to perform that covenant any longer. Then it is said that the absence of the apprentice is no excuse, because he is a stranger to the indenture. There is no averment of his sealing the deed, and, therefore, in some respects he may be said to be a stranger, but, as regards the present question, it is otherwise; and I think he is so far identified with the plaintiff that his default is the default of the plaintiff, and, therefore, an answer to the action.

Judgment for the defendants.

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W. R. BROWNE *against* LEE.

ASSUMPSIT for 454*l.* 8*s.*, as so much money paid by the plaintiff to the use of the defendant. Plea, first, non-assumpsit; and, secondly, the defendant's bankruptcy and certificate. At the trial before Lord Tenterden C.J., at the London sittings, before Michaelmas term 1825, a verdict was found for the plaintiff, subject to the opinion of this Court on the following case:

By indenture, made the 24th of November 1818, between *J. H. Browne* of the first part; the plaintiff of the second part; the defendant and *H. H. Browne* of the third part; *B. Hey* of the fourth part; and *T. Horton* of the fifth part; *J. H. Browne*, in consideration of 2000*l.*, paid in manner in the indenture mentioned, covenanted with *B. Hey* to pay for his use one annuity of 230*l.* 10*s.* during the life of him, *J. H. Browne*; and the plaintiff, the defendant, and *H. H. Browne*, jointly and severally covenanted and agreed with the said *B. Hey*, his executors, &c., that they would effectually guarantee the payment of the annuity to *B.*

the commission against his co-surety; but that he could not *at law* be compelled to repay more than one third of the sum paid on account of the annuity, although the third surety had become insolvent at the time of such payment.

The grantor of an annuity assigned it, together with all securities, for a valuable consideration to *A.*, but part of the consideration-money belonged to *B.*, one of the co-sureties for payment of the annuity, and it was agreed by deed, between *A.* and *B.*, that the former should retain, out of the annual payments, sufficient to pay him the principal sum advanced, and interest; and that, when he should have been paid principal and interest, the annuity should be for the benefit of *B.*: Held, that the annuity was not thereby extinguished, but that it continued a subsisting annuity between the several co-sureties, and that *B.* having paid money to *A.* on account of it, the other sureties were liable to contribution:

Held, also, that although the stock assigned for further securing the annuity would ultimately revert in *B.*, by the deed made between him and *A.*, that did not discharge the other sureties.

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against
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Hey, and would well and truly pay to him, *B. Hey*, on demand, all or such part of the annuity as should be in arrear, together with all costs, &c., which should or might have been incurred by him, *B. Hey*, in consequence of the non-payment of the same, or any part thereof. The plaintiff, also, by the same deed, at the request of *J. H. Browne*, granted, sold, assigned, transferred, set over, and confirmed unto the said *T. Horton*, his executors, &c., all that the balance or residue, or so much as should remain, of the sum of 5000*l.* 4 per cent. annuities therein-mentioned, (after setting apart and deducting the principal sum of 2000*l.* as thereinbefore was mentioned,) to which the plaintiff, his executors, &c. should or might become, or if the said indenture had not been made, would have become entitled upon the decease of one *Johnson* therein-mentioned, under the will of *H. H. Browne* deceased. The annuity was payable by quarterly payments on the 24th of *February*; 24th of *May*; the 24th of *August*; and the 24th of *November* in each year. This indenture was duly executed by all the parties. A memorial pursuant to the 53 G. 3. was enrolled on the 4th *December* 1818, and in the column, headed "nature of the instrument," were the words "grant of annuity." About the beginning of 1821, *J. H. Browne*, the grantor, and *H. H. Browne*, one of the sureties, became insolvent; and on the 30th of *June* 1821, a commission of bankrupt was issued against the defendant, under which he was found bankrupt, and duly obtained his certificate on the 11th of *September* following. At the time such commission issued, there were two quarterly payments of the annuity due and unpaid. After the defendant's bankruptcy, the plaintiff, his co-surety, made the following

l owing payments in respect of the arrears of the annuity, viz., 110*l.* on the 21st of *January* 1822, and 100*l.* on the 5th of *November* 1822; the plaintiff received from the defendant, on the 17th of the same month of *November* 1822, 70*l.* as being in satisfaction of one-third of the said sum of 110*l.*, and 100*l.*, together with costs, upon a settlement between them of two actions then pending in respect of such payments. Subsequent to this transaction, viz., on the 8th of *October* 1823, the plaintiff paid to Mr. *Hey* 75*l.*; and on the 17th of *November* 1823, the defendant paid the plaintiff, under threat of arrest, the further sum of 67*l.* 10*d.* for contribution, and the plaintiff's attorneys thereupon gave the following receipt, without any specification as to time: "Received 17th *November* 1823, of Mr. *Lee*, 67*l.* 10*d.* in respect of Mr. *W. R. Browne's* claim on him for contribution for Mr. *Hey's* annuity." On the 1st of *May* 1824, there being at that time arrears of the annuity due, *Hey*, by indorsement on the indenture, in consideration of 1995*l.*, granted, sold, and assigned this annuity to *Wilkinson*, his executors, &c., and the full benefit and advantage of all covenants, powers, and remedies thereby given for securing and enforcing payment of the annuity, and all the estate, title, and interest of him (*Hey*) therein and thereto; habendum to *Wilkinson* thenceforth during the natural life of *J. H. Browne*, subject to the proviso for re-purchase therein contained; and further all arrears of the quarterly or other payments of the annuity then due and unpaid, and all costs and expences on account thereof, or of the non-payment thereof, and also the judgment entered up by virtue of the warrant of attorney therein-mentioned against *J. H. Browne*, the defendant, the plaintiff, and *H. H. Browne*, at the suit

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of *Hey*, in the court of King's Bench, for 1000*l.*, and all sums of money thereafter to become payable for the redemption or re-purchase of the annuity, or otherwise in relation thereto. *Habendum*, the same to *Wilkinson*, his executors, &c., as his and their own proper goods, and chattels, and effects, absolutely. By another indenture of the same date, viz., 1st of *May 1824*, made between *Wilkinson* of the one part, and the plaintiff of the other part; after reciting, amongst other things, that the sum of 995*l.*, part of the said sum of 1995*l.*, the consideration-money before mentioned, for the purchase of the annuity and the arrears thereof, and the costs, charges, and expences aforesaid, was the money of the plaintiff, *W. R. Browne*, and not the money of *Wilkinson*, but that 1000*l.*, the residue thereof, was the money of *Wilkinson*; and that upon the treaty for the purchase of the annuity by *Wilkinson* from *Hey*, it had been agreed between *Wilkinson* and the plaintiff, that the annuity, with the arrears thereof, and the securities for the same, should be so purchased by or in the name of *Wilkinson*, to secure to him the repayment of the said sum of 1000*l.* and interest, and then for the benefit of the plaintiff, *W. R. Browne*, it was witnessed, that in pursuance of the agreement, and for better securing the payment of the 1000*l.*, part of the 1995*l.*, *Wilkinson* should stand *and be possessed of the annuity* and the arrears, and the other securities for the same *upon trust*; that he, *Wilkinson*, should receive and enforce payment of the same, when and as the same should from time to time become due; and should take and prosecute all actions, &c.; and out of the monies to be received, to retain and repay himself the 1000*l.* advanced by him, and interest at the rate of 5*l.* per cent. from the date thereof,

thereof, and subject thereto for the absolute benefit of the plaintiff; and the plaintiff covenanted, that he would on demand pay or cause to be paid to *Wilkinson* the 1000*l.*, and would in the meantime pay to him, *Wilkinson*, 5*l.* per cent. interest for the same, such interest to be payable half-yearly from the date of the said indenture. In making the above arrangement with the grantee, *Hey*, by which he assigned the annuity to *Wilkinson* for 1995*l.*, the parties made up the account, taking it as a mortgage at 5*l.* per cent. from the beginning, and giving credit for the difference between 5*l.* per cent. upon 2000*l.* and the annuity. The grantee was entitled to more. After the assignment to *Wilkinson*, he received from the plaintiff by credit, on transactions of business, sums equal to the amount of the annuity, up to December 1824, and gave a receipt as for the annuity, but he considered the money as interest, and partial payment of his principal.

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F. Pollock for the plaintiff. If the grant of annuity in this case were void for want of a sufficient memorial, perhaps it could not be said that the plaintiff has been compelled to pay money on account of the annuity. The instrument by which the annuity is secured, is described in the memorial as a "grant of annuity." A covenant to pay an annuity, may be described in the memorial as a grant. It has been held, that where the grantor of an annuity secured it by a bond, whereby he bound himself, his heirs, &c. it was not necessary that the memorial of the bond should describe it as binding his heirs, *Horwood v. Underhill* (a). So where an an-

(a) 4 *Taunt.* 346.

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nuity was granted by an indenture, which also contained a release of a former annuity, it was held sufficient to describe the annuity deed as the grant of an annuity. *Crowther v. Wentworth* (*a*). That case is precisely on point. The plaintiff, then, having paid money on account of this annuity, has a right, in a court of law, to call upon the defendant, his co-surety, to contribute that proportion of the sum paid, which he ought in justice to have paid himself. The right to contribution is stated by Lord Eldon, in *Craythorne v. Swinburne* (*b*), to depend rather upon a principle of equity than contract, unless in the sense, that the principle of equity being established, a contract may be inferred from the implied knowledge of that principle by all persons. The right results from a fixed principle of justice, for as the creditor has a right to resort to any of the sureties for the whole, or to each for his proportion, if he from partiality to one surety will not enforce it, the law gives the same right to the other surety, and enables him to enforce it. Natural justice requires, that the surety having become security with others, shall not have the whole thrown upon him by the choice of the creditor, not to resort to remedies in his power, the effect of which would be an equal contribution. In this case there were three co-sureties. One is insolvent. Another has paid a sum of money, for which all three were jointly and severally liable. Justice, therefore, requires, that as each of the sureties was liable for the whole, the one who has paid the whole should recover a moiety from that co-surety who alone is in a situation to reimburse him; and upon this principle in equity,

(*a*) *Ante*, 366.(*b*) *14 Ves.* 164.

two

two out of three sureties were compelled to pay each a moiety, the third having become insolvent, *Peter v. Rich* (a). Then the next question is, whether the plaintiff's demand is barred by the defendant's certificate? and that depends on this, whether he could have proved his debt under the commission of bankrupt issued against the defendant, for the statute 49 G. 3. c. 121. s. 8. applies only to those cases where the surety is in a condition to prove. Here the plaintiff, as surety, could not prove, for it was uncertain whether he ever would have any claim against the defendant, his co-surety. He could only have a claim against him by the default of the principal. In *Flanagan v. Watkins* (b), it was held that a surety under an annuity deed was not entitled to prove the value of the annuity, as a debt under a commission against the grantor. The last question is, was the annuity extinguished by the deed of the 1st May 1824? The annuity was assigned by the grantee to *Wilkinson* for 1995*l.* Part of that sum was the money of the plaintiff, and part the money of *Wilkinson*. The annuity was to be a security to *Wilkinson*, for the repayment of his 1000*l.*; he was by receiving the annuity from time to time to pay himself that sum and interest, and then the annuity was to belong to the plaintiff. But still, as between the plaintiff and defendant, it continued a subsisting annuity. The original grantor continued liable to pay it to *Wilkinson*, and *Wilkinson* was the person beneficially interested in it, until the 1000*l.* and interest were paid.

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E. H. Alderson contrà. The instrument in question is not properly described; it is not merely a grant of an

(a) 1 Chas. Ca. 34.

(b) 3 B. & A. 186.

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annuity, but contains an assignment of stock as a further security to the grantee; and on this account the case is distinguishable from *Crowther v. Wentworth* (*a*). The act of parliament requires that the nature of the whole instrument should be described in the memorial. Here the nature of the instrument is described only in part. Secondly, the defendant is at law only liable to pay his proportionate share, being one third; *Deering v. The Earl of Winchelsea* (*b*), *Cowell v. Edwards* (*c*). But, thirdly, even as to this amount, the defendant is discharged by his certificate. The question now is, whether the defendant, at the time when the money was paid by the plaintiff, remained liable to the person to whom it was so paid? He was not liable if that person could have proved under the commission. By the stat. 49 G. 3. c. 121. s. 17., it is competent for any annuity creditor of the bankrupt to prove under the commission as a creditor, for the value of his annuity; and the certificate is made a bar against all demands in respect of such annuity, the arrears and future payments thereof, in the same manner as it would be with respect to any other debt which might be proved under the commission. The value of the annuity is considered as a debt. The grantee of the annuity, therefore, might have proved his debt under the commission. Consequently, the grantee of the annuity was an annuity creditor of the defendant. In *Baxter v. Nichols* (*d*), the bankruptcy and certificate of one of several sureties for the payment of an annuity was held to discharge him. It is true, that there the bankrupt was, by the terms of the annuity deed,

(*a*) *Ante*, 366.

(*b*) 2 *Bos. & Pwl.* 270.

(*c*) 2 *Bos. & Pwl.* 268.

(*d*) 4 *Taunt.* 90.

made

made a joint covenantor; but it appeared upon affidavit that he was only a surety. If so, then the grantee might have proved the value of the annuity, under the commission issued against the defendant, and the latter is discharged by his certificate. Lastly, the plaintiff, before he made these payments, purchased the grantee's interest in the annuity; for although *Wilkinson* continued the nominal assignee, the substance of the transaction was, that the plaintiff became the assignee of the grantee; and if so, the annuity was thereby extinguished, the plaintiff being in fact both the person to pay and to receive it. If this were so, then the payments made subsequently to the 1st of *May* 1824 were not annuity payments, for which alone the defendant could be liable as surety. Besides, by this arrangement, the relative situation of the defendant as surety was altered, for the plaintiff had originally conveyed property to the grantee, for the better securing of the annuity: and by this transaction, that property as well as the annuity becoming again vested in the plaintiff, the defendant would lose the benefit of that additional security for the arrears which might become due.

BAYLEY J. I am of opinion that the plaintiff in this case is entitled to recover one-third of the money which he has paid on account of this annuity. In equity, indeed, in the case of *Peter v. Rich* (a), where one of three sureties had paid a sum of money, it was held, that he was entitled to recover one moiety from another of the co-sureties, the third having become insolvent; but I think, that at law, one of three co-sureties can only re-

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cover against any one of the others an aliquot proportion of the money paid, regard being had to the number of sureties. But it is objected for the defendant, that the memorial is insufficient, because it describes the instrument by which the annuity is secured, merely as a "grant of annuity." The stat. 53 G. 3. c. 141. s. 2. requires, "that a memorial of every deed, of the names of the parties, of the witnesses, of the persons for whose lives the annuity is granted, and of the persons by whom the same is to be beneficially received, shall be enrolled in the High Court of Chancery, in the form and to the effect following, with such alterations therein as the circumstances or nature of any particular case may require." The enacting clause does not in terms require the nature of the instrument to be described; but the schedule which follows this clause contains several columns, one of which is headed "Nature of the Instrument;" and under that head there is given an instance of the description of the nature of the instrument which the statute requires, viz. "Lease and release," "Warrant of attorney to confess judgment," "Bond in penalty." The statute imposes no obligation on the parties to describe the property on which the annuity is secured. The object of the statute was, that such a description should be given as to enable a party, on looking at the memorial, to claim the copy under the fifth section. In *Butler v. Capel* (a) an instrument was described in the memorial as an assignment of certain leasehold premises; it was, in fact, an under-lease, and that was held to be a sufficient description of the nature of the instrument, within the meaning of the act of par-

(a) 2 B. & C. 251.

liament;

liament; and it was said by the Court, that the statute did not require an instrument to be described strictly according to its legal effect. The words "grant of annuity" are as true a description of the nature of an instrument by which an annuity is secured, as the words "lease and release." They convey as much information as the legislature intended to be conveyed by the description of the nature of the instrument within the meaning of this act of parliament. But then it is contended, that the defendant, having become bankrupt, is exonerated by his certificate from any obligation to reimburse the plaintiff any portion of the sum of money he may have paid on account of the annuity since the bankruptcy. The plaintiff and defendant were co-sureties for the grantor of the annuity, and the latter has made default. The stat. 49 G. 3. c. 121. s. 17. enacts, "that it shall be competent to any annuity creditor of any person against whom a commission of bankrupt shall issue, to prove under the commission for the value of such annuity, which value the commissioners are to ascertain; and the certificate of every bankrupt under whose commission such proof shall be or might have been made, shall be a discharge of such bankrupt." That clause applies to annuity creditors only. Was the plaintiff an annuity creditor of the defendant? I think he clearly was not. *Hey*, the grantees of the annuity, was not an annuity creditor of the defendant, who was only liable in case the grantor made default. *Hey* was the annuity creditor of the grantor. Besides, how could a value be put on the plaintiff's interest in this annuity? The value of an annuity for life is estimated by considering it as an annuity for that number of years which is the probable

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probable duration of the life for which it is granted. That is the value of the interest of the grantee. But how is the value of the interest of a surety to be calculated? He never will be liable if his principal does his duty, and may, perhaps, never be called upon to pay any thing. It seems to me, that this is not a case in which the plaintiff could prove the value of this annuity as a debt under the commission. *Baxter v. Nichols* (*a*) is not in point, because there the question arose between grantor and grantee. As between the grantee and the four persons who had in that case granted the annuity, each of the latter was an annuity debtor. That clearly was a case within the meaning of the act of parliament. But another objection is made, that the plaintiff has redeemed the annuity, that it was thereby extinguished, and, consequently, that the money paid by the plaintiff to *Wilkinson*, was not a payment made on account of the annuity, and that the defendant is under no obligation to contribute towards that payment. The plaintiff and the defendant were æquali jure before the 1st of May, they being co-sureties for the payment of an annuity to the grantee *Hey*. It is said, that the plaintiff put an end to the annuity, and extinguished it by the deeds of the 1st of May. The mode by which the plaintiff carried into effect the arrangement between him and *Wilkinson*, continued the annuity as between the plaintiff and the defendant. *Wilkinson* stood in the place of *Hey*, the former grantee, and became entitled to receive the annual payments. It is true, that, as between *Wilkinson* and the plaintiff, the former was only to receive 1000*l.* and interest and that after payment of that sum and

(*a*) 4 *Tenn.* 90.

interest,

interest, the plaintiff was to receive the annual payments. But at the time when the plaintiff made the payments in respect of which he seeks to recover contribution, *Wilkinson* was entitled both at law and in equity to receive them; the annuity was, as between the plaintiff and defendant, a subsisting annuity. But it is then said, that by this transaction of the 1st of *May* 1824, the relative condition of the defendant as a surety was altered, and consequently he is discharged. The plaintiff had pledged certain 4 per cents. as a further security for the payment of the annuity, and it is said that as he is substantially the purchaser of the annuity, his co-sureties will be deprived of the benefit of this additional security. Looking at the nature of the deed, it seems to me that this transaction has not the effect of releasing the surety. Three persons guarantee the payment of the annuity by the grantor to the grantees. The legal operation of that guaranty is, that if one of those persons be called upon to pay the annuity, he may call upon the others for contribution. But there is another clause in a subsequent part of the deed, by which one of the sureties pledges certain property as a further security for the payment of the annuity. If that clause was intended for the benefit of the sureties, then any arrangement which would have the effect of depriving them of that benefit, would discharge them. But that clause purports to have been inserted at the request of the grantor of the annuity, and was introduced for the purpose of giving a better security to the grantees, and not for the purpose of releasing the sureties from the responsibility which they had incurred by a prior clause guaranteeing the payment of the annuity.

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HOLROYD J. I am of the same opinion. It seems to me that the words "grant of annuity," are a sufficient description of the nature of the instrument, within the meaning of the act of parliament. I am also clearly of opinion, that the 17th section of the 49 G. 3. c. 121. does not apply to sureties for the payment of an annuity, but to annuity creditors only, whose interest may be ascertained by the commissioners, by putting a value on the annuity itself. But how is the interest of one of several co-sureties for the payment of an annuity to be valued? He is liable to pay only in default of his principal, non constat that he will be called upon to pay any thing, or how often, or what sum. It is impossible to calculate the value of his interest. I also think that the annuity, as between these parties, was not extinguished by the transaction of the 1st of *May* 1824, but that it continued a subsisting annuity, and that the plaintiff afterwards made certain payments on account of it, which he and his co-sureties were liable to pay by reason of their having become sureties. Then it is said, that by reason of the plaintiff's having assigned certain property as a further security for the payment of the annuity, and having by the deed of the 1st of *May* deprived his co-sureties of the benefit of that fund, he has discharged them. The assignment of stock was intended not for the benefit of the sureties, but of the grantee. Even if the payment had been made out of that fund, it seems to me that the co-sureties would have been liable to contribute. I am also of opinion that the plaintiff is entitled to recover in this action one-third of the money which he has paid on account of the annuity.

LITTLEDALE J. I am of the same opinion. I think that the instrument was properly described as a grant
of

of an annuity, and that it was not necessary to describe the further provisions which the deed contained for better securing the annuity. I also think that this is not a case within the 49 G. 3. c. 121. s. 17., because the plaintiff was not an annuity creditor, although he may be a creditor in respect of a transaction arising out of an annuity. On the other point, I agree with my Brothers *Bayley* and *Holroyd*.

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Judgment for the plaintiff.

PETER *against* KENDAL and Another.

THIS was an action on the case for the disturbance of a ferry. The declaration stated that the plaintiff was lawfully possessed of a certain ancient ferry over a certain river, from a place called *Rock*, otherwise *Black Rock*, in the parish of *Saint Minver*, in the county of *Cornwall*, to *Padstow*, in the same county, and from *Padstow* to the said place called *Rock*, &c., for carrying and conveying within the said ferry all passengers and other persons having occasion for the same, and the horses and goods of all such passengers and persons,

The owner of a ferry demised it to A. by parol at a certain annual rent. The latter, at the end of a few weeks, finding it unprofitable, proposed to become the servant of the former as boatman, and to account to him for all money received from passengers, upon being al-

lowed fixed daily wages. This was assented to by the owner of the ferry, and A. became his servant, and received the stipulated wages: Held, that there was a surrender of A.'s interest in the ferry by act and operation of law.

In an action on the case for the disturbance of a ferry, it is sufficient for the plaintiff to prove that he was in possession of the ferry at the time when the cause of action arose. It is not necessary for the plaintiff to allege in his declaration, or to prove at the trial, the payment of any specified sum for passage money.

Neglect of duty on the part of the owner of the ferry is no answer to the action, although the crown may, on that ground, repeal the grant by scire facias or quo warranto.

The owner of a ferry must have a right to use the land on both sides of the water for the purpose of embarking and disembarking his passengers, but he need not have any property in the soil on either side.

Qu. Whether a ferry can be demised without deed?

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from, &c., to, &c., in boats kept by and by the authority of the plaintiff there for that purpose, taking for the same certain reasonable freights and ferryages to the said plaintiff in that behalf due and of right payable; that defendants wrongfully carried divers passengers, &c. for hire in a certain boat over and across the river where plaintiff had such ferry, and upon the said ferry, whereby the plaintiff lost great gains and profits, and was disturbed in his possession of the ferry. The second count stated the wrongful carrying to be in a boat of *the defendant's, and near to the said ferry of the plaintiff.* At the trial before Gaselee J. at the Bodmin assizes, July 1826, it appeared that by copy of a court roll of the manor of Penmaine of the 28th December 1748, Humphrey Arthur, one of the customary tenants, surrendered one moiety of the passage from Black Rock, within the parish of Minver, in the county of Cornwall, parcel of the customary lands of the said manor, and part of the ancient duchy of Cornwall, with all its rights, &c., together with one boat, &c., upon condition that Joseph Peter might be admitted tenant for the same, to him, his heirs and assigns for ever, according to the custom of the said manor. The admission of Peter upon this surrender, and his admission to the other moiety upon the surrender of Anne Arthur, were also proved; and it was shewn that the plaintiff was grandson of Joseph Peter, the surrenderee, and was possessed of the ferry, with a horse boat, and small boat, which carried passengers from different points on the Saint Minver side to the quay at Padstow, or to the beach above or below the town, according as the tide served. The land on the Saint Minver side is within the duchy manors, but on the Padstow side the land belonged to different private persons.

persons. At *Christmas* 1825, the plaintiff entered into a verbal agreement to let the ferry to *Brown* for a year, for 14*l.*; but a few weeks afterwards, *Brown* finding it unprofitable, it was agreed that the plaintiff should take the earnings, and allow him 1*s.* 9*d.* a day; and he continued the boatman of the plaintiff under this agreement, and accounted to him for all he received, and was allowed the stipulated sum per day. The defendant *Kendal*, who had for ten years rented the ferry in conjunction with *Brown*, began in *February* 1826 to ply with his boat to carry passengers across the river. He never made any charge, but received what the passengers chose to give him. Upon this evidence, it was contended by the defendant's counsel that the plaintiff, by reason of the demise to *Brown*, was out of possession, and that the action ought therefore to have been brought in the name of *Brown*. Secondly, that there could not by law be a ferry unless the owner had the right of soil on both sides of the water; and in support of that position, *Saville*, 11. pl. 29. was cited, where it is said to have been held for law in the Exchequer Chamber, "that a ferry is in respect of the landing-place, and not of the water; that the water may belong to one, and the ferry to another; and that in every ferry the land on both sides of the water ought to belong to the owner of the ferry, for otherwise he cannot land on the other side." Thirdly, that the ferry was not shewn to have a legal origin either by customary grant or prescription, the duchy having been in the crown within the time of legal memory, and, therefore, that the allegation that this was an ancient ferry was not made out. The learned Judge thought that this being a possessory

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action, the plaintiff had made out a sufficient case to go to the jury; but on these points he reserved liberty to the defendant to move to enter a nonsuit in the event of a verdict being found for the plaintiff. On the part of the defendant it was then proved that until the opposition boat had been set up, the ferry had been badly served; that the public sustained much inconvenience, and private boats had often put passengers across in consequence of the neglect; and that the fare formerly taken was 1*d.*, but that now 2*d.* was claimed and paid. The learned Judge told the jury, that although there appeared to have been great neglect, for which the plaintiff might have been liable to an action, yet as it was admitted there was no abandonment of the ferry, the plaintiff was entitled to recover. The jury having found a verdict accordingly with 1*s.* damages, a rule nisi was obtained for a nonsuit, on the grounds that the action ought to have been brought by *Brown*; and that there was no proof that the ferry was an ancient ferry; or for a new trial on the ground that the facts proved on the part of the defendant were an answer to the action.

Carter and *Coleridge* now shewed cause. The action was properly brought in the name of the plaintiff; for although an agreement, by which *Brown* was to have rented the ferry, once existed, it had been abandoned before the committing of the act complained of. *Brown* proposed to become the servant, instead of the tenant of the plaintiff, and the latter assented to the proposal made. The relation of master and servant was, therefore, substituted for that of landlord and tenant; and

the

the plaintiff, with the assent of *Brown*, became again possessed of the ferry, and all profits arising therefrom ; that operated as a surrender, by act and operation of law, of *Brown's* interest in the ferry. Then it is said, that a legal origin of the ferry was not shewn by the court rolls ; and that no origin by prescription could be shewn, because the duchy had been in the crown within the time of legal memory, and that the franchise, if existing before, was then merged. But this is a mere possessory action for the disturbance of a franchise, and as against a wrong-doer the plaintiff was bound only to prove a possessory title, *Blissett v. Hart* (*a*). Assuming that it was necessary to shew a prescriptive title, it ought after so long an usage to be presumed ; for although at the trial it appeared that within the time of legal memory the duchy of *Cornwall* was in the crown, yet the franchise was not merged, for there is a distinction between franchises, which, if not granted to a subject, the king would have in himself as waif, estray, wreck, &c. and those which a common person may have by grant or prescription, but the king by prerogative would not have, as warren, fair, market with toll, &c. If the former come to the crown, they are extinguished ; but if the latter come to the crown, they remain in esse, and are not extinct. For if the king should not have them by this means, they would be lost, *Heddy v. Wheelhouse* (*b*). A ferry is a liberty by prescription on the king's grant to have a boat for passage upon a great stream, for carriage of horses and men for reasonable toll (*c*). It is not a franchise, therefore, which the king would have

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(*a*) *Willes's Rep.* 508.(*b*) *Cro. Eliz.* 591.(*c*) *Termes de la Ley*, 338.

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in himself, if not granted to a common person, and, therefore, it is not merged. Then as to the objection, that the owner of the ferry has not the soil on both sides the river, the case cited from *Saville*, pl. 11. is not law. It is clearly sufficient for the owner of the ferry to have a right to embark and to disembark passengers on both sides, which is a mere easement on the soil of another (a). Lastly, the neglect of the plaintiff did not destroy his right to the ferry, although it might be a ground for a repeal of the franchise by *scire facias* or *quo warranto*.

Manning contra. The demise to *Brown* could not be surrendered without a note in writing under the statute of frauds, 29 Car. 2. c. 3. s. 3. [*Bayley* J. This being an incorporeal hereditament, would not the demise be void not being by deed?] No objection was taken to the sufficiency of the demise at the trial; the plaintiff chose to rely on the subsequent abandonment of the contract of letting. If the plaintiff had confined his evidence to the possession of himself and his ancestors, perhaps the Court would not have enquired into the origin of the grant; but here it appeared that the plaintiff claimed not by prescription, but by a customary grant. It was, therefore, necessary to shew that this was a customary tenement, grantable in the mode in which it is stated to have been granted. Besides which, the possessions of the duchy being inalienable (b), such a conveyance unexplained is an evasion of the statutory grant of 11 Edw. 3., *Sutton Poole* case (c). This

(a) 12 East, 554. n.

(b) See the *Prince's* case, 8 Co. 1. *Mann. Exch. Pract.* 573.

(c) *Wightw.* 149.

grant

grant being within the period of legal memory, the franchise contended for must have merged in the crown, which puts an end to any title by prescription or by custom. The forfeiture of the franchise by negligence might not only have formed the subject of a scire facias, but might have been enquired into by quo warranto; *Maydenhead Quo Warranto* (a), a proceeding which supposes the party is not legally in possession. Next, there can by law be no good franchise of a ferry, unless the owner has the property in the soil on both sides of the water. That was decided in the case referred to in *Saville*, and the decision is adopted by Lord C. B. *Comyn* in his *Digest*, tit. *Piscary* (B). Again, under the words *certain reasonable freights and ferryages*, the plaintiff was bound to shew that some fixed and determinate payments were made; whereas here, not only was there no evidence of a fixed and determinate sum, but the existence of such a claim was negatived by the evidence, which shewed not a fixed, but a fluctuating payment.

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BAYLEY J. I think this case does not admit of any doubt. The first objection is, that the plaintiff was out of possession, and that this action ought to have been brought by *Brown*, who was entitled to possession as tenant under the demise. To that there is a very satisfactory answer. It appeared at the trial, that when *Brown* found out that he could not keep the ferry at 1*4l.* per annum, he said to the plaintiff, Will you allow me to be your servant? They settled afterwards upon that

(a) *Palmer*, 76. 86.

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footing, and *Brown* became the servant instead of the tenant of the plaintiff, and the latter received the profits of the ferry, and paid *Brown* wages for his services as boatman. A new relation which, in regard to this property, was wholly inconsistent with that of landlord and tenant, then took place, with the consent of both parties. That operated as a surrender, by operation of law, of the tenant's interest in the ferry. It was next objected, that the evidence did not shew this to be an ancient ferry, either by customary grant or prescription. The present plaintiff was proved to be in possession. It seems to me that it was not necessary to prove the copy of the court-roll; it was quite sufficient to support this action, to prove that the plaintiff was in possession of the ferry; and it was shewn that the ferry had existed for a long period of time. It is then said that the neglect of the plaintiff has destroyed his right to the ferry. I am of opinion that that neglect does not, *ipso facto*, destroy the right to the franchise. The proceeding by quo warranto supposes the party in actual, though not in legal possession, and therefore judgment of ouster is necessary to dispossess him. In the case of an abuse of a franchise by negligence, the crown may repeal the grant by scire facias or quo warranto, and may vest it in some other person, if that is thought necessary. But mere negligence in the party in whom the ferry is vested does not destroy the right. Then it is said that this is not a good ferry, because the land on both sides does not belong to the owner of the ferry. I am of opinion, that it is not necessary that the owner of a ferry should have the property in the soil on either side. He must have a right to land upon both sides,

but

but he need not have the property in the soil on either. It is sufficient if the landing-place be in a public highway. This is perfectly consistent with the principle laid down in *Saville*. That principle is, that a ferry is in respect of the landing-place, and not of the water. But I cannot agree to what is stated as a conclusion resulting from that principle, "that every owner of a ferry must have the land on both sides of the water, for otherwise he cannot land." The reason given for his having the property in the soil is insufficient, for he may have a right to land on both shores without having any property in the soil of either. The original owner of the land may have granted the soil of it, and reserved out of the grant to himself, his heirs, and assigns, the right of using the land on both sides for the purpose of embarking and disembarking passengers. I think also, that it was not necessary for the plaintiff to allege in his declaration the payment of any specific sum for passage money, and what need not be alleged need not be proved. This rule must therefore be discharged.

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HOLROYD J. I think, that what is laid down in *Saville* is not law to the extent to which it is there stated. The owner of the ferry must, as incident to the ferry, have such right to use the land on both sides as to enable him to embark and disembark his passengers; but he need not for that purpose have any property in the soil. It is sufficient if he has a right to use the land for all the purposes of his ferry. That is a right to use the land of another for a particular purpose, and is an incorporeal hereditament. I think, also, that it was not necessary for the plaintiff to produce the court-rolls; it

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was sufficient to prove possession and enjoyment of the ferry.

LITTLEDALE J. concurred.

Rule discharged.

The KING against The Inhabitants of
RAMSGATE.

By the statute 6 G. 4. c. 57. it is enacted, that no settlement shall be gained by reason of settling upon or paying parochial taxes for a tenement, unless the house, or building, or land (of which the tenement consists) shall be occupied under such yearly hiring, and the rent for the same, to the amount of 10*l.*, be actually paid for the term of one whole year: Held, that no settlement is gained by settling upon a tenement, unless the rent for the term of one whole year, whatever be its amount, be actually paid.

UPON an appeal against an order of two justices, whereby *G. Sweetman*, his wife, and children, were removed from *Ramsgate*, in the *Isle of Thanet*, in the county of *Kent*, to the parish of *Saint Lawrence*, in the *Isle of Thanet*, in the same county, the sessions quashed the order, subject to the opinion of this Court on the following case:

In the month of *April 1825* *S. Sweetman*, the wife of the pauper (the pauper himself being of unsound mind), hired of *R. Croft*, Esq. a house in the parish of *Saint Lawrence*, for one year, at a rent of 15*l.* per annum, payable quarterly.

The pauper and his family occupied the house for the year, and the pauper's wife paid the sum of 6*l.* 15*s.* towards the rent. Soon after the expiration of the year the landlord distrained upon the pauper's goods for the rent remaining due, and received under such distress, after payment of the expences thereof, the sum of 4*l.* 17*s.* 6*d.*, making the total rent received amount to 11*l.* 12*s.* 6*d.*

Bolland

Bolland in support of the order of sessions. No settlement was gained by renting a tenement in the parish of *Saint Lawrence*, because a whole year's rent was never paid (*a*). Before the statute 59 G. 3. c. 50. the settlement on a tenement of the annual value of 10*l.* conferred a settlement, whether the rent was paid or not. That statute required, *inter alia*, that the rent should be paid for the term of one whole year. But it applied only to settlements by the *renting* of tenements, and a settlement might nevertheless be gained by paying parochial rates and taxes in respect of a tenement of the yearly value of 10*l.*; consequently, in such a case, it was necessary to prove the value of the tenement, which gave rise to expensive litigation, and the 6 G. 4. c. 57., which passed on the 22d *June* 1825, was intended, as appears from the recital, to remedy this inconvenience, and by section 2. of this latter statute it is enacted, “that no person shall acquire a settlement by reason of settling upon, renting, or paying parochial rates for any tenement, unless the house, or building, or land, (of which the tenement is to consist,) be bona fide rented by such person at and for the sum of 10*l.* a year at the least, for the term of one whole year; nor unless such house, or building, or land, shall be occupied under such yearly hiring, and the rent for the same, to the amount of 10*l.*, actually paid, for the term of one whole year at the least.” The words “*for the term of one whole year at the least*” apply to both branches of the sentence, and

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(a) There was another point argued, viz. that part of the rent having been levied by process of law, that was not a payment which satisfied the statute; but as the judgment of the Court did not proceed on that ground, it becomes unnecessary to state the arguments.

relate,

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relate, therefore, both to the occupation and the payment of rent. And the meaning of the provision, as to payment of rent, must be, that, in order to gain a settlement, the rent for one whole year (whatever be its amount) must be actually paid, and that such yearly rent must be 10*l.* at the least.

F. Pollock contra. The statute 59 G. 3. c. 50. required that the rent, whatever its amount might be, should be paid for the *term of one whole year*. From the provisions of that statute this absurd consequence followed, that a party who rented a tenement at a yearly rent of 1000*l.* could not gain a settlement by paying 999*l.* in respect of that rent; while another person whose annual rent did not exceed 10*l.* would gain a settlement by paying the latter sum. The 6 G. 4. c. 57. repeals the former statute, and there is a material difference in the language of the two statutes, as far as the payment of rent is concerned. The latter statute enacts that "no settlement shall be gained, unless the house, or building, or land shall be occupied under such yearly hiring, and the rent for the same to the amount of 10*l.* actually paid for the term of one whole year at the least." In order to give a reasonable construction to this enactment, the words "and the rent for the same to the amount of 10*l.* actually paid," ought to be read as if they were in a parenthesis, and then the construction will be, that in order to gain a settlement, although the premises must be occupied for a year, the payment of rent to the amount of 10*l.* will be sufficient, and this construction is the more reasonable, because the gaining of a settlement will then depend on the ability of the party to pay a given sum.

BAYLEY

BAYLEY J. It is very desirable in all cases to adhere to the words of an act of parliament, giving to them that sense which is their natural import in the order in which they are placed. The stat. 59 G. 3. c. 50. enacts, "that no person shall acquire a settlement by reason of his dwelling for forty days in any tenement rented by such person, unless such tenement shall consist of a house or building, being a separate and distinct dwelling-house or building, or of land, or of both, bona fide hired by such person at and for the sum of 10*l.* a year at the least for the term of one whole year, nor unless such house or building shall be held and such land occupied, *and the rent for the same actually paid*, for the term of one whole year at the least, by the person hiring the same." That statute, therefore, required that the rent (whatever its amount might be) should be paid for the term of one whole year. But as that statute applied only to settlements which might be gained by reason of the *renting* of a tenement, a settlement might still be gained by paying parochial rates in respect of a tenement of the annual value of 10*l.*, without complying with the requisites of that statute, and that was the cause of much litigation. The statute 6 G. 4. c. 57. was passed to remedy that inconvenience; and it recites, "that the settlement of the poor had been made to depend in some instances upon the annual value of tenements which they might have rented, or upon the annual value of tenements in virtue of which they had paid parochial rates, and that the ascertaining such value in such respective cases had given rise to very expensive litigation, and that doubts had been entertained whether the 59 G. 3. c. 50. had been effectual for the purpose of altering

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altering the law in respect of the necessity of proving the annual value of tenements so rented, and that it was expedient that further provision should be made relating thereto." It then repeals the former statute, and enacts, "that no person shall acquire a settlement by reason of settling upon, renting, or paying parochial rates for any tenement not being his own property, unless such tenement shall consist of a separate and distinct dwelling-house or building, or of land, or of both, bona fide rented by such person at and for the sum of 10*l.* a year at the least for the term of one whole year, nor unless such house, or building, or land shall be occupied under such yearly hiring, and the rent for the same to the amount of 10*l.* actually paid for the term of one whole year at the least." It is very material to attend to the collocation of these words,—"for the term of one whole year at the least." They are the last words of a sentence, and, according to the grammatical construction, apply to both branches of the sentence. It is contended that they do not apply to the latter branch of the sentence, "the payment of rent," but that the words "and the rent for the same to the amount of 10*l.*" ought to be construed as if they were in a parenthesis; but I cannot collect either from the recital or from any of the previous provisions in the act, that they ought to be so read. I think that they ought to be construed according to the plain import which they bear in the order in which they are placed in the act. If the legislature had intended that in order to gain a settlement, it should be sufficient to pay rent to the amount of 10*l.*, the words "for the term of one whole year at the least," should have immediately followed the words relating to the occu-

occu-

occupation. It is true, that the words "to the amount of 10*l.* a year at the least," create some difficulty, but that difficulty is not such as to warrant us in construing them as if they were placed in an order different from that in which we find them. Taking them in that order, their application is not confined to one branch of the sentence. Undoubtedly, it will follow from this construction, that if a person rents premises at a very high annual rent, he will not gain any settlement unless he pays the whole amount of one year's rent. On the other hand, if the other construction were adopted, a person who rented premises at 15*l.* per annum, and resided three years on the premises, would gain a settlement by paying 10*l.* on account of one year's rent. I cannot think that was intended. Upon the whole, I think that we are bound to construe the words of this act according to the natural import belonging to them, in the order in which they are placed in the act, and so construing them, I am of opinion that these words are not to be confined to one branch of the sentence, and, consequently, the rent actually reserved must be paid for the term of one whole year at the least. The pauper not having done that, no settlement was gained in the parish of *St. Lawrence*. The order of sessions must therefore be quashed.

HOLROYD J. I think that the words "for the term of one whole year at the least" must be construed according to their nature and import in the order in which they stand in the act of parliament, and so construing them, it appears to me that the rent, which must amount to 10*l.* a year at least (but which may exceed that sum),

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sum), must be paid for the term of one whole year at the least.

LITTLEDALE J. concurred.

Order of sessions quashed.

CHARLES Lord SOUTHAMPTON and J. DRUMMOND
against BROWN.

Where, by indenture between *A.* and *B.* of the first part, *C.* of the second part, and *D.* of the third part, *A.* and *B.* did, with the assent of *C.*, demise to *D.* for years, yielding and paying a certain rent to *E.* and the heirs of his body, and *D.* covenanted with *A.* and *B.* and *E.* to pay the rent, and to repair, &c. : Held, that *E.* could not join with *A.* and *B.* in an action of covenant against *D.* for non-payment of rent and not repairing.

COVENANT. The declaration stated, that by indenture made on, &c. at, &c. between *J. Drummond* and *C. Drummond* in his lifetime (whom plaintiffs have survived), of the first part; the Dowager Baroness Southampton, then guardian of *C.* Lord Southampton (plaintiff), of the second part; and defendant, and one *G. R.* of the third part. *J. D.* and *C. D.*, since deceased, with the assent of Lady Southampton, did demise to defendant and *G. R.* certain premises therein mentioned, habendum for twenty-one years, reddendum unto the said Charles Lord Southampton, and the heirs male of his body, and for default of such issue, unto such other person or persons as for the time being should be entitled to the remainder or reversion of the same premises, expectant on the determination of the said demise during the residue of the said term, a certain yearly rent; and defendant and *G. R.* did severally covenant and agree with *C. Lord Southampton*, and with *J. D.* and *C. D.*, and the survivor, and the heirs of the survivor, that they would pay the said yearly rent unto the said *C. Lord Southampton*, &c. (according to the reddendum), covenants to repair, &c. Breach, non-payment

payment of rent, and not repairing. Demurrer and joinder.

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Comyn in support of the demurrer. There are some old authorities which tend to shew that a reservation of rent to the person entitled to the reversion is good. But here there is no averment that Lord Southampton is within the reddendum as reversioner. The only right of action shewn by the declaration is in *J. Drummond*, the surviving lessor. Lord Southampton is not a party to the indenture, and clearly ought not to have been made a plaintiff, *Berkeley v. Hardy* (a), *Oates v. Frith* (b), *Swry v. Cole* (c), *Frontin v. Small* (d), *2 Preston on Conveyancing*, 184.

Campbell contra. There would be little difficulty in shewing that a reservation to a stranger is good. It may not, in that case, be strictly speaking *rent*; but the covenant to pay is good, and may be the foundation of an action. The real difficulty arises from Lord Southampton being joined as a plaintiff together with the surviving lessor. The case of *Berkeley v. Hardy* is by no means decisive of this, for the principal ground of that decision was that no interest passed to *Hardy* under the supposed demise. If Lord Southampton were a mere stranger, it would be an answer to the action; but he is rather in the nature of a lessor.

BAYLEY J. Upon the face of this lease we are not at liberty to presume that any interest passed except from

(a) *5 B. & C.* 355.
(c) *Latch.* 255.

(b) *Hob.* 130, 151.
(d) *2 Str.* 705. *2 Ld. Raym.* 1418.

J. and

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Judgment for the defendant.

The KING *against* The Company of Proprietors
of the REGENT'S CANAL.

By a canal act, it was provided that *lands*, whether covered with water or not, and also all dwelling-houses, *wharfs*, &c. belonging to the company, should be rateable to the maintenance of the poor in the several parishes where they were respectively situated; the lands according to their

quantity and quality, and the dwelling-houses, wharfs, &c. according to the nature and respective uses thereof, and should be assessed in like manner as lands of a like quality, and dwelling-houses, wharfs, &c. of a like and similar size or nature in the respective parishes where the same should be situate, should be assessed, and that the rates, duties, and other personal property of the Company, liable to be rated to the poor, should be assessed in like manner and in the same proportion as other personal property should be assessed: Held, that land of the Company, used by them for the purpose of the canal, was rateable quâ land not in respect of its improved value, but in respect of that which would have been its value, if it had not been used for the purposes of the canal.

The Company had, on the margin of a large basin, a piece of land adjoining the private yard of a timber merchant. This piece of land next the basin consisted of natural ground; it was not faced with brick or timber, and the ground below the water gradually sloped down to the bottom of the basin. The timber-merchant landed his timber upon this piece of land, and it was there marked and measured by the revenue officers. No acknowledgment or rent was paid to the Company for this privilege of landing the goods there, but their rates and duties were increased, a greater number of ships entering the basin in consequence of this privilege: Held, that this piece of land was not a wharf within the meaning of the act of parliament, and was not liable to be rated as such to the relief of the poor.

UPON an appeal by the defendants against a rate for the relief of the poor of the parish of Saint Ann, Limehouse, the sessions confirmed the rate, subject to the opinion of this Court on the following case. In the rate or assessment the appellants stood rated thus:

No. 1.—Company of proprietors of *Regent's Canal*, for *wharfs and banks* adjoining the basin leading to the *Regent's Canal* - - - themselves £130
No. 2.—Ditto for *land covered with water*, comprising the part of the basin within the respondents' parish - - - - Ditto 150

No. 3.

No. 3.—Company of proprietors of *Regent's Canal*,
for land covered with water, comprising that
part of the *Regent's Canal*, and the towing-
path and banks within the respondents' parish,
themselves £150

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No. 4.—Ditto for one double lock in *Limehouse Fields*, and for one other double lock leading
from the basin to the canal in the respondents'
parish - - - ditto for each lock 25

The rate was duly allowed and published, and was in
all respects correct in point of form. By the 52 G. 3.
c. 195. s. 101. it was provided, "that lands, whether
covered with water or not, and also all dwelling-houses,
wharfs, warehouses, lock-houses, and other houses of
and belonging to the company should be rateable and
chargeable to the maintenance of the poor, and to all
other parochial rates and taxes in the several parishes
and places where they were respectively situated, the
lands, according to their quantity and quality, and the
dwelling-houses, wharfs, warehouses, lock-houses, and
other houses, according to the nature and respective
uses, dimensions, and descriptions thereof, and should
be charged and assessed in like manner as lands of a
like quality, and dwelling-houses, wharfs, warehouses,
lock-houses, and other houses of a like and similar size,
nature, dimension, or description, in the respective
parishes where the same should be situate, were or
should be assessed or charged; and that the rates,
duties, and other personal property of the company
liable to be rated to the poor, or other parochial taxes
in any such parishes or places, should be rated and
assessed in like manner, and in the same proportion as
other personal property rateable in the said parishes and

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places respectively should be rated and assessed, and according to the length of the line of the said navigation in such respective parishes and places, and not otherwise or in any other manner, provided that, before such personal property should be rated, fourteen days' notice should be given in writing to, or left at the dwelling-house of the treasurer or clerk, or any other officer of the company residing in the parish or place where such rate should be intended to be made, by the respective overseer of the poor, of the intention so to do."

As to No. 1. the facts were as follow: The land rated was the margin of a large basin or dock belonging to the appellants. This basin communicates on the one hand with the *Thames*, by means of a lock capable of admitting ships of a large burthen; and on the other hand with the *Regent's* canal, by means of a double lock of only sufficient size to admit the barges used in the internal navigation. On the east, and on part of the south and north sides of this basin is a narrow slip of land, the property of the appellants, and containing altogether one acre, two rods, and fourteen perches, situated in the respondents' parish. Over this land on the south and east sides, there was originally made a towing path for barges proceeding between the canal and the *Thames*. This is still occasionally used in times of frost, but at all other times the barges cross the basin diagonally and have no occasion for it. At the end next the double lock it is terminated by a fence and gate, which is kept locked by the defendants, and is only opened by their servants, who keep the key of the gate for persons having navigation business, who are always freely admitted, and use the towing path as a foot path on those occasions. Next adjoining the

slip

slip of land on the east side of the basin are situate the bonding yard for timber of Messrs. *Richardson*, and the private yards of Messrs. *Richardson* and of Messrs. *Watkins* and *Fry*. The vessels bringing cargoes from foreign parts and other places to these yards take their births along the east side of the basin, and unload their timber and other goods, by means of stages belonging to such ships, on the slip of land of the defendants rated as a wharf, the upper edge of the slip of land next the basin consisting of the natural ground, and not being faced with brick, stone, or timber, and the ground below the water gradually sloping down to the bottom of the basin. The timber is measured and marked on this slip of land by the officers of the revenue, and is after that, with the other goods, conveyed either into the bonding yard, or on payment of the duties, into the private premises of the above persons. For this privilege of landing their goods, neither Messrs. *Richardson* nor Messrs. *Watkins* and *Fry* pay any acknowledgment or rent to the defendants; they only pay, as all other persons do, the rates and duties imposed in respect of the tonnage of the ships entering the basin, but the number of the ships coming into the basin of the defendants is greatly increased by reason of the establishment of Messrs. *Richardson's* premises as a bonding yard, and the access thereto from the basin; and there has been, in consequence thereof, a considerable increase in the tonnage rates and duties paid on such ships to the company, since the bonding yard has been established. No other persons are allowed to land their goods there, nor is there any crane or convenience for landing goods. In another part of the basin, situate in *Ratcliff* hamlet, there are cranes and wharfs regularly built,

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where the defendants, in addition to the tonnage rate charge both for the cranage and wharfage of all goods there landed. Neither the south nor the north side of the basin within the respondents' parish, was used for landing goods. If the land on the east side of the basin be to be considered as a wharf, of which the defendants were the occupiers, its annual value, together with the value of the land on the north and south sides of the basin, was 130*l.* as stated in the rate. The annual value of the land within the respondents' parish, on the east, south, and north sides, if assessed as land of a like quality, was only 8*l.* As to Nos. 2, 3, and 4, the facts were as follow;—the basin, canal, towing-path, and locks, if liable to be assessed in respect of the profit arising to the defendants from the rates and duties received by them, were of the value stated in the rate; and they were also of the value stated in the rate, if the defendants were liable to be rated for the rent at which the basin, canal, towing-path, and locks, would let to any other company similarly situated as the appellants, but their value, if liable to be rated as land of a like quality within the parish, was only the sum of 34*l.* No personal property was rated in the parish at all, nor were there any rates due specially for passing either of the two double locks rated, but only for passing for certain distances along the canal. There were no other profits derived to the defendants from those premises, except the rates and duties imposed by the *Regent's Canal* act. The questions for the opinion of this Court were; first, as to that part of the rate or assessment, marked No. 1., whether, under the circumstances stated relating thereto, the land on the east side of the basin ought to be rated as a wharf? And if it ought not to be

so rated, then the sessions were of opinion that the rate ought to be amended by reducing the sum of 130*l.* to the sum of 8*l.*; and, second, as to that part of the rate or assessment marked Nos. 2, 2, and 4, whether, under the 101st clause of the act of the 52 G. 3. c. 195., the basin, canal, towing-paths, and locks, are liable to be rated merely as land of a like quality within the parish? And if so, the sessions were of opinion, that the rate ought further to be amended by substituting the sum of 34*l.* for the sum of 350*l.*

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Andrews and *Adolphus* in support of the order of sessions. The defendants were properly rated for the slip of land on the east side of the basin, as a wharf. Goods were landed on this piece of land, and the defendants derived an increased tonnage in consequence of ships entering their basin for the purpose of landing their goods there. Then, if it was used for all purposes for which a wharf is used, and the defendants derived from it all the benefit which they could derive from a wharf, it was properly rateable as a wharf within the meaning of this act of parliament. It appeared also that timber was marked on this slip of land by the officers of the revenue, and was then conveyed into the bonding warehouses. The statute 43 G. 3. c. 132. s. 12. enacts, that before any goods shall be lodged in the bonded warehouses, the same shall be duly entered with the proper officers of the customs, and regularly landed. The goods in this case must be taken to have been regularly landed within the meaning of the statute. Secondly, the defendants were properly rated for that value of the land which it has acquired from being used for the purposes to which it is applied. For the land is to be

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assessed as land of a like quality, that must mean land covered with water, and used by a canal company for the purpose of a canal or basin.

F. Pollock, Brodrick, and Ellis contra. It must be admitted, that the land comprised in Nos. 2, 3, and 4, is rateable for that value which it has acquired from the circumstance of its having been used for the purpose of the canal, unless there be some clause in the act of parliament expressly exempting it from such charge, *Rex v. Grand Junction Canal Company (a)*. In the clause set out in the case, there is a marked distinction between land, and the canal duties or rates. The land is to be rated according to quantity and quality, and dwelling-houses, &c. according to their uses, dimensions, &c. The land, therefore, qua land, was not to be rated according to the use to which it was applied. That use being made the subject of rate by the clause which applies to *rates and duties*; the tolls being made rateable per se, when other personal property is assessed, contrary to the general rule of law as it has prevailed since *Rex v. Nicholson (b)*. If the land qua land were rateable for its improved value, it would follow that the company might be rated twice for the same property; first, for the profit as land; and second, in the event of other personal property being rated, in respect of the rates and duties which are the profit of the land. *Rex v. Grand Junction Canal Company (c)*, and *Rex v. St. Peter the Great (d)* are authorities to shew that the company in this case were rateable for the lands at the same value as other adjacent lands, and not for their improved

(a) 1 B. & A. 289.
(c) 1 B. & A. 289.

(b) 12 East, 542.
(d) 5 B. & C. 475.

value.

value. Then, as to the other point, the land comprised in No. 1. is not a wharf. Lord *Hale*, in his treatise *De Portibus Maris*, c. 2. p. 46., says that a port consists of something that is natural, viz., an access of the sea, whereby ships may conveniently come, &c., and something that is artificial, as keys, and wharfs, and cranes, and warehouses, &c. The term *wharf*, therefore, implies something constructed or built by the art of man, and that is the sense in which it is used in several clauses in this act of parliament. Section 86. enacts, that if the owners of any lands through which the canal passes shall not *make, build, and construct* proper and sufficient *wharfs*, warehouses, and other conveniences for the use of the navigation as the company shall think necessary, then the company shall have full power to do it. Section 126. enables an individual, through whose property the canal was to pass, "to *make or erect* any *wharf, quay, landing-place, crane, weigh-beam, or warehouse* for his own private and exclusive use." The 46 G. 3. c. 153., entitled an act for the preservation of the public harbours of the United Kingdom, enacts, "that it shall not be lawful for any person to *make, construct, or erect* any pier, quay, *wharf*, &c. in any public harbour, without giving a month's notice to the admiralty." Besides, there being no acknowledgment or rent paid to the company by *Richardson*, there was no wharfage or cranage, which are the usual incidents to a wharf. It is true that in consequence of the convenience afforded for landing goods, there was an increase in the tolls for tonnage. But those tolls are rateable only if personal property is assessed; they cannot be substituted for wharfage so as to give a character to the place which it would not otherwise have.

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BAYLEY J. It seems to me that the rate in this case ought to be reduced. I think that the property comprised in No. 1. is rateable, not as a wharf, but as land; and that the property comprised in Nos. 2, 3, and 4. is rateable as land, but not for the value it has acquired from being used for the purposes of the canal. The statute 52 G.3. c. 195. states that the making of the *Regent's Canal* will be of great public utility. Now that is a key to enable us to construe the act of parliament. If the canal had not been made, and the land had remained in its original state, it would have been rateable in the same proportion as other land in the parish. On the other hand, if there had been no express provision in the act of parliament regulating the mode in which the land taken for the purpose of the canal was to be rated, it would be rateable, not in proportion to its value when so taken, but in proportion to the value which it has acquired from being used for the purposes of the canal. But the making of a canal being a work of great public utility, and attended with great expence, it is perfectly just to relieve the undertakers of it from a burden which will attach to them only by reason of the improvements they make, at a very heavy expence, in the property used by them for their canal. It is not unusual, therefore, to insert in canal acts clauses to exonerate the undertakers from contributing a larger sum to the maintenance of the poor in respect of the land used by them for the purposes of their canal than would have been contributed in respect of that same land if it had not been so used. It seems to me that the 101st section of the 52 G. 3. c. 195. was intended to have that effect. It enacts, "that lands, whether covered with water or not, shall be rateable to the main-

tenance

tenance of the poor, according to their quantity and quality." The subsequent words clearly explain what was intended by the word *land*. It goes on: "And the dwelling-houses, wharfs, warehouses, lock-houses, and other houses, according to the nature and respective uses, dimensions, and descriptions thereof; and shall be charged and assessed in like manner as lands of a like quality, and dwelling-houses, wharfs, warehouses, lock-houses, and other houses of a like and similar size, nature, dimension, or description are assessed or charged." The act having in the first instance provided for the rating of land, whether covered with water or not, and for buildings, then introduces a different subject of ratability; and that is to be rated only on condition that certain other property is rated. It enacts that the rates, duties, and other personal property of the company liable to be rated to the poor in any such parishes or places, shall be rated and assessed in like manner and in the same proportion as other personal property rateable in the said parishes and places respectively shall be rated and assessed. The introduction of the word *other* shews clearly that the rates and duties were contemplated by the legislature as a species of personal property, for there follows a provision that, before *such* property shall be rated, fourteen days' notice in writing shall be given to the treasurer of the company. There are, therefore, three distinct species of property which are the subject of rate: first, lands, whether covered with water or not; secondly, houses and buildings; and, thirdly, rates and duties. The first two are rateable at all events; the latter only on condition that personal property is also rated.

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rated. Now the property described in Nos. 2, 3, and 4. comprises nothing but land, part of which was covered with water. I think that that land is to be rated in the same manner as land of the same quality would have been if it had not been converted into a basin, or applied to the other purposes of the canal. If it had been intended that it should be rated according to its improved value, the legislature would have said so. Indeed if that be the effect of the clause, it is wholly useless, as far as the land is concerned, for that would be rateable for its improved value if the act had not contained a provision on the subject. Then the remaining question is, whether the property intended to be comprised in No. 1. can be properly rated as a wharf. The word *wharf* is classed in the act with several other things of an artificial description, and which require expence in their erection. The words are "dwelling-houses, wharfs, lock-houses, and other houses." This piece of land, at all events, is not a wharf in the construction of which any expence has been incurred. The term *wharf*, in its ordinary sense, imports a place built or constructed for the purpose of loading or unloading goods. It is used in that sense in the several clauses of the act which have been referred to in argument. Then, considering the different clauses together, and that the word *wharf* usually signifies something built or constructed, it seems to me that this is not a wharf within the meaning of the act, but at most only a landing place. Upon the whole, therefore, I think that the rate ought to be amended, by inserting the sum of 8*l.* instead of 130*l.*, in respect of that part of the rate marked No. 1.; and by inserting 34*l.* instead of

350*l.*,

350*l.*, in respect of that part of the rate marked Nos.
2, 3, and 4.

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HOLROYD J. I am entirely of the same opinion. If the construction contended for were to prevail, the consequence would be, that the canal company would be rateable for the land occupied by their canal in the same manner as they would have been if the act had contained no special clause; that would make the clause wholly useless. I also think, that the piece of land comprised in No. 1. is not a wharf within the meaning of this act of parliament.

LITTLEDALE J. I am of the same opinion. The piece of land comprised in No. 1. is not a wharf. That term usually denotes something built or constructed by the art and industry of man; and though it may have been used for some of the purposes for which a wharf is used, it does not therefore follow that it is a wharf. Goods may be, and frequently are, landed upon the sea-beach, but the beach is not therefore a wharf. If this were a wharf it might fairly be expected, that wharfage dues would be payable; but no compensation whatever is paid to the proprietors of the canal for the use of the piece of land specifically, though they do receive wharfage dues for the use of other premises. As this piece of land is not a building constructed by the art of man, and as no wharfage or compensation is paid to the owners for the use of it as a landing-place, I am of opinion that it is not a wharf, within the meaning of this act of parliament. As to the property comprised in Nos. 2, 3, and 4, I think

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think that it ought to be rated as mere land. The company take up a great quantity of land for the purposes of their canal, and they incur great expence in the making of it. In the act of parliament authorising them to make the canal, a distinction is made between lands and houses, and the rates and duties, as the subject of rateability to the poor. The lands and houses are to be rated as lands and houses of the same description; but the rates and duties, which are the profits arising from the particular use of the land, are to be rated only in case other personal property is rated; but if the land is to be rated qua land, according to the value which it has acquired, in consequence of the purpose to which it has been applied by the company, and which value arises from the canal duties, then if other personal property in the parish were to be rated also, it would follow that the company would be liable to be rated twice over for the same property, once for the land in respect of its improved value, and a second time for the canal rates and duties. That cannot have been intended. The rate must, therefore, be amended.

Rate amended, by reducing the sum of 130*l.* to the sum of 8*l.*, in respect of No. 1., and by reducing the sum of 350*l.* (the aggregate of the several sums mentioned in Nos. 2, 3, and 4.) to the sum of 34*l.*

1827.

The KING *against* The Inhabitants of
THORNHAM.

UPON appeal against an order of justices, for the removal of *R. Hammond*, labourer, his wife, and children, from the parish of *Sedgford*, in the county of *Norfolk*, to the parish of *Thornham*, in the same county; the sessions confirmed the order, subject to the opinion of this Court on the following case: —

The pauper being a married man, went on *Midsummer-day* 1812, to live with one *Barsham*, a farmer residing in the parish of *Thornham*, as his shepherd, under the following written agreement: — “*April 28th 1812, hired R. Hammond, shepherd, at 12s. per week, 6d. per head a lamb at clip-day, three weeks' board in lambing, meat of victuals, and pluck when he kills a pig, and to have twenty-one ewes going, to come to his place at Old Midsummer-day next.*” The pauper came to live with *Barsham* under this agreement, and brought with him the ewes and lambs and his furniture. For the first quarter of a year he resided in *Barsham's* farm-house, and for the remainder of the two years he lived in a cottage of his master's, near the farm-house, with his wife and family, rent free. The going of the twenty-one ewes was worth more than 10*l.* a year. During a fortnight or three weeks of the first year, the ewes were fed off *Barsham's* farm on the turnips of a neighbouring farmer, and during part of the second winter they were fed on straw.

Where a shepherd served a farmer for two years, under an agreement for “12*s.* per week, and to have twenty-one ewes going:” Held, that this contract only gave the shepherd a right to have his ewes fed in the same manner as his master's flock, either on pasture or on dry food, and, therefore, that the pauper did not gain any settlement in *T.*, although the feed of the ewes was worth more than 10*l.* a year, it not being any part of the bargain that the sheep should be pasture fed.

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Nolan and *Maliby* in support of the order of session. The question in this case is; first, whether an agreement for the going of twenty-one sheep be an agreement under which the growing produce of the farm is to be taken at all events: secondly, whether, supposing under and by virtue of that contract the growing produce might be, and in point of fact was to be, that is not substantially a contract, that the sheep should be fed *on the farm*. As to the first point the term "going" has a definite meaning in the law, it means that the cattle should *go on the farm*, and is to be understood in contradistinction to feeding *straw*, or farm yard feeding; it intends the feeding by the sheep *going on the land*, in opposition to foddering them in the yard. The term has the same meaning as a "gate," and it was clearly held, that "cattle gate," in a stinted pasture, was a tenement. So in *Rex v. Dersingham* (a), it was held that a "go of cattle on a common" was a tenement, and according to this sense, a "going" means a *certain portion of growing produce*, and, therefore, was a tenement. Under this agreement it was not optional in the master to feed the sheep elsewhere than on the land itself. But, secondly, supposing the contract did not give such an absolute interest in the growing produce, yet, if under that contract there might be a right to take growing produce, and if this was in point of fact enjoyed for more than forty days, it was sufficient to confer a settlement. Now under this agreement, it was clearly competent to the master to feed sheep forty days on pasture; and, therefore, it may be considered as

(a) 7 T. R. 671.

agreement

agreement in the alternative, for the going on the land itself, or the feeding in his farm yard. If there had been a formal agreement in the alternative, and the master had fed them on growing produce, it would have been sufficient; and so it would be sufficient if, by the master's option, they were fed all the time except forty days in the farm yard. The case of *Rex v. Fillongley* (*a*), shews that an optional agreement is sufficient. There the pauper's brother gave him a farm "as long as the brother pleased, and to take again when he pleased;" but it was held to be a sufficient interest, being in fact held and enjoyed long enough. So the case of *Rex v. Minster* (*b*) differs nothing from the present in regard to the option, because in the present case there was an alternative, and the feeding was had for a year. In *Rex v. Bardwell* (*c*), the point now in question was not brought before the Court, for it was not necessary in that case to consider what the express meaning of the term "*going*" was. That word was there accompanied with other words, which left no doubt as to its meaning, for the contract was that the shepherd was to have the going of thirty sheep *with his master's flock*.

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BAYLEY J. I am of opinion that the pauper did not gain any settlement in this case in the parish of *Thornham*. He stipulated to have the going of twenty-one ewes. I think the fair meaning of the expression is, that his twenty-one ewes were to be with, and to go with his master's flock, and were to be fed from time to time upon growing produce, or on

(*a*) 1 T. R. 458.(*b*) 3 M. & S. 276.(*c*) 2 B. & C. 161.

hay



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Mr. Nolan in his *Tre
p. 19, 20.,* (a text book
great assistance,) cites,
*Bardwell (a), Rex v. T
v. Darley Abbey (c).*
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cognised and acted upon in *Rex v. Sutton St. Edmunds* (*a*). In all the cases cited in the argument, there was a right of turning the cattle on a particular piece of land. A *cattle gate* imports a right of pasture on particular ground. Considering, therefore, the terms of this contract between the master and servant, and believing that neither of them had any very accurate idea of the meaning of the term "going," I think that when they stipulated that the latter should have twenty-one ewes going, they must be taken to have used that word in its ordinary sense, thereby importing that the twenty-one ewes should go with the master's flock wherever it went, and should be fed from time to time as his flock was, either on pasture or on dry food; and if that be the meaning of the term *going*, it was no part of the contract that the ewes should be pasture fed, and the case falls within the principles laid down and acted upon in the several authorities which I have referred to. Consequently, no settlement was gained in the parish of *Thornham*. The order of sessions must therefore be quashed.

HOLROYD J. The word "going" has no technical meaning. I think that, in its ordinary sense, and when used in relation to the subject-matter of such a contract as this, it imports that which was explained by the other words used in the contract in *Rex v. Bardwell* (*b*) to be its meaning there, viz. that the servant's cattle should go with his master's flock. The contract, therefore, in this case, gave the servant no right to have his ewes pasture fed; and that being so, the authorities re-

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(a) 1 B. & C. 558.

(b) 2 B. & C. 161.

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ferred to establish that no settlement was gained
Thornham.

LITTLEDALE J. This case depends entirely upon meaning of the term "going." I am not aware that word is used in the country in the sense attributed to it in the course of the argument. If the court quarter sessions had found that the word "going" had that particular meaning in the part of the court where the bargain was made, we should have been bound by it. But there being no such finding, ought to understand that word in its ordinary sense; so understanding it, I think the meaning of the contract was, that the twenty-one ewes were to go as the other ewes went, viz. to be fed on growing produce or on food as his master's cattle were; and if that be so, then it is quite clear that the going of twenty-one ewes did not constitute a tenement, and, therefore, no settlement was gained in the parish of *Thornham.*

Order of sessions quashed

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Cook and Others, Assignees of GRIFFIN, a
Bankrupt, *against* PALMER.

ASSUMPSIT for money had and received. Plea, the general issue. At the trial before Lord *Tenterden C. J.*, at the *London* sittings after *Trinity* term 1825, a verdict was found for the plaintiffs for 603*l.*, subject to the opinion of this Court upon the following case. The plaintiffs are the assignees of *D. Griffin*, a bankrupt. The defendant was sheriff of *Surrey* at the time when the transactions hereinafter mentioned occurred. On the 12th of *April* 1822, *J. Theobald* entered up judgment against *Griffin* on two several warrants of attorney, and issued writs of *fi. fa.*, returnable on *Wednesday next after fifteen days of Easter*, directed to the defendant, as sheriff of *Surrey*, indorsed to levy the two sums of 509*l.* 13*s.* 4*d.*, and 1019*l.* 10*s.* 1*d.* The defendant issued his warrants directed to *Jarvis*, his bailiff, who, on the same 12th of *April* seized the stock in trade of the bankrupt, to answer those two sums. *Jarvis* remained in possession until *June*, when a commission of bankrupt issued against *Griffin*, on an act of bankruptcy committed on the 1st of *May* 1822. During the time that *Jarvis* was in possession, he suffered part of the bankrupt's stock to be sold, and received the proceeds, amounting to 400*l.* After the commission issued, *Jarvis* directed the sheriff's brokers to remove from the premises goods sufficient to satisfy the two writs, which they did. In *June*, the defendant being ruled to return the writs, as to one returned that he had levied part, and had goods to satisfy the residue which remained in his

Where a sheriff's officer had seized under a *fi. fa.* goods of a trader, more than sufficient to satisfy the levy, and the trader having become bankrupt, and assignees chosen before the goods were sold, the assignees authorised the officer to deliver the whole of the goods to *A. B.* and to receive from him a certain sum as the full value of the goods, which he did accordingly, and out of that money satisfied the execution creditor, but never paid over the residue to the assignees: Held, that they could not sue the sheriff for this money, the officer not having derived his authority to sell the whole of the goods from the sheriff, but from the plaintiffs, the assignees.

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this action, became bank
by his sureties.

dorsed on the two writs, had exceeded his authority, and that consequently the sheriff was not responsible for his act. Secondly, that the agreement was such an interference in the transaction by the plaintiffs as deprived them of the right to sue the sheriff. But that cannot discharge the sheriff from a liability which attached as soon as the goods were seized. This action is brought by persons not connected with the executions; at the time of the levy their rights had not arisen. Then as to the first point, the sheriff returned that he had received 400*l.*, and had besides the goods of the bankrupt in his possession. He therefore adopted the act of the officer in seizing those goods, and must be responsible for the proceeds.

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F. Pollock contra. There is no doubt that a sheriff is liable for the wrongful act of his bailiff, if that be done in pursuance of his employment, and within the scope of his authority. Thus, if a bailiff arrest a wrong person, or take the goods of a wrong person, the sheriff is responsible. But if a bailiff having a writ against one were to arrest four persons, the sheriff would not be liable. Where an officer seizes goods under a *fi. fa.*, the sheriff is responsible for the whole, but the course is for the officer to sell sufficient to satisfy the levy, and then the sale stops. Suppose then the plaintiffs had been present at such a sale of *Martin's* goods, and after the amount of *Theobald's* executions had been raised, they had requested the officer to proceed and sell the remainder of the goods, he would then have been, for that part of the transaction, their agent and not the agent of the sheriff. The transaction in question is in substance the same. The plaintiffs, who authorized the

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sale of the whole of the goods, were bound to take care that the officer received no more of the purchase-money than would satisfy the levy. If they allowed him to receive the residue, it made him their agent.

BAYLEY J. The sheriff was not a party to the agreement for the sale of the whole of the bankrupt's stock and, therefore, it seems to me that the plaintiffs cannot recover in this action. It appears that *Theobald* had issued two executions, that part of the money had been raised, and certain goods, more than sufficient to satisfy the residue, were in the officer's possession. The duty of the officer was to raise the residue, and then stop the sale; but an arrangement was made by the plaintiffs and *Theobald*, authorizing the officer to sell the whole of the goods for a certain sum. Upon that sale the officer was identified with the sheriff, to the extent of the sum to be levied, but no further, his authority to sell to a greater extent not being derived from the sheriff, but from the plaintiffs and *Theobald*, who thereby made him their agent as to that part of the transaction. The sheriff never had any right to call upon the officer to pay over the surplus to him, nor was it the officer's duty to do so; and as the sureties are only responsible for the due performance of the officer's duty to the sheriff, the plaintiffs cannot be entitled to recover, even treating the sureties as the real defendants in this action. I therefore think that a nonsuit must be entered.

HOLROYD and LITTLEDALE Js. concurred.

Judgment of nonsuit

END OF EASTER TERM.

AN
INDEX
TO THE
PRINCIPAL MATTERS.

ACT OF PARLIAMENT.

See MANDAMUS, 1.

ACTION.

*See ASSUMPSIT, BANKRUPT, 8.
FERRY.*

1. By an act of parliament, a canal company were bound to repair the banks of the canal. In an action brought by the company against the owner of adjoining land for digging clay-pits upon his own land, and causing the plaintiffs' banks to give way, there was some evidence to show that the bank was not in good repair; but the learned judge directed the jury to find for the plaintiffs, if they thought that the falling in of the bank was caused by the defendant's having dug clay-pits: Held, that the plaintiffs were not entitled to recover, unless, at the time when the bank gave way, it was in good repair; and that question, not having been submitted to the jury, a new trial was granted. *Staffordshire Canal Company v. Hallen*, H. 7 & 8 G. 4.
Page 317

2. In an action against excise officers for the detention and neg-

ligent custody of certain malt, &c., taken under a distress upon a conviction under the malt act (statute 43 G. 3. c. 74.) it appeared that the plaintiff, having been convicted in a penalty, a warrant issued, directing the defendants to levy the same, and that they seized and removed the plaintiff's goods from his premises, and that afterwards he paid the penalty. The defendants, ten days after this payment, brought the goods back to the plaintiff's premises, but in a damaged state: Held, that in order to make the detention unlawful, the plaintiff ought to have demanded the goods, and that there having been no demand, the detention was not unlawful. *Hutchings v. Morris and others*, E. 8 G. 4.

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3. Where certain goods upon a farm were seized by virtue of a writ of *pone per vadlos* against the occupier, issued out of the Court of Pleas at Durham, and were afterwards, upon his default, forfeited to the bishop, who, by writ to the sheriff, ordered them to be assigned to the party at whose suit the *pone* issued, in

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satisfaction of his damages : Held, that the sheriff was not bound to pay the landlord half a-year's rent, then due, before he removed the goods. *Brandling v. Barrington*, E. 8 G. 4. Page 467

4. Where a sheriff's officer, to whom a warrant upon a writ against *A.* was delivered, sent a message to *A.* and asked him to fix a time to call and give bail, and *A.* accordingly fixed a time, attended, and gave bail: Held, that this was not an arrest, and that therefore an action for a malicious arrest would not lie against the party suing out the writ, although he had no cause of action. *Berry v. Adamson, Gent.*, E. 8 G. 4.

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5. Where *A.* by agreement made on the 31st of March, agreed to grant to *B.* a lease of certain premises, *habendum* from the 29th of September then next for 21 years, in consideration of 1000*l.* of which 10*l.* was paid at the time of the agreement, 90*l.* was to be paid on the 13th of April, and the residue on having possession of the premises, and *B.* being called upon to pay the 90*l.*, demanded an abstract of *A.*'s title, which was refused; whereupon he gave notice that he would rescind the contract, and commenced an action to recover the 10*l.* which he had paid: Held, that he was entitled to recover, it being proved at the trial that at the time when the action was commenced, *A.* had no power to grant the lease contracted for. *Roper v. Combes*, E. 8 G. 4.

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6. The master of a vessel bound on a voyage from *Lisbon* to *London* with a cargo of fruit and wine, the former, which was stowed above the wine, being deliverable at *Coxe's quay*, which is higher up the river *Thames* than the

London docks, where the wine was deliverable, put into the *London docks*, and while there, applied to the consignees of the fruit to allow the same to be landed there, but they refusing the vessel proceeded from the *London docks* towards *Coxe's quay*, under the charge of a pilot duly licensed for that purpose and while under his charge, ran foul of a barge and sunk it. An action brought by the owner of the barge: Held, that the vessel, not having reached the place at which she was to commence the delivery of her cargo her removal from the *London docks* to that place was not in change of mooring within the statute 6 G. c. 125. s. 63., and that the master, therefore, was bound by law to have a pilot on board her at the time when she ran foul of and sunk the barge and, consequently, the owners were discharged from responsibility. *M'Intosh v. Slade and Others*, E. 8 G. 4. Page 657

AFFIDAVIT.

See CORPORATION, 2.

AGREEMENT.

See ASSUMPSIT, LEASE, VENDOR AND VENDEE, 10.

ANNUITY.

1. It is not necessary that an annuity deed should be executed by all the parties to it before the memorial is enrolled pursuant to the 53 G. 3. c. 141. s. 2.

If the names of all the witnesses to the deed are inserted in the memorial, that is sufficient, without specifying the parties by whom the deed was executed in their presence. *Buckeridge v. Flight*, (in error) M. 7 G. 4. 49. 2. The

2. The same person being agent for the grantor of an annuity for the purpose of procuring the money, and also for the grantee for the purpose of paying over the consideration money to the grantor, at the time of executing the deeds for securing the annuity, paid over to the grantor the whole consideration money, but in pursuance of a previous agreement between the agent and the grantor, part of the consideration money, amounting to 15*l. per cent* upon the whole money, was returned by the latter to the agent for law expences and for brokerage; it was held that this was a return of part of the consideration money to the party advancing the same, within the meaning of the 59 G. 3. c. 141. s. 6., and the annuities were set aside upon the grantor's paying the principal and interest, together with reasonable costs and brokerage. *Finley v. Gardner*, H. 7 & 8 G. 4. Page 165
3. Where an annuity was granted by an indenture, which also contained a release of a former annuity : Held, that it was sufficient to describe the annuity deed in the memorial as a grant of an annuity. *Crowther v. Wentworth*, H. 7 & 8 G. 4. 366
4. Where *A.* purchased an annuity for his life, which was regularly paid up to the time of his death, but no memorial of the grant of annuity was enrolled : Held, that *A.*'s executrix could not on that ground insist that the contract was void, and recover back the consideration money paid for the annuity. *Davis, executrix of Griffiths, v. Bryan*, E. 8 G. 4. 651
5. Where an annuity-deed contained, besides covenants to pay the annuity, an assignment of stock, for better securing the an-

nuity : Held, that it was well described in the memorial as a " grant of annuity."

One of three co-sureties for the payment of this annuity, paid money on account of the annuity after the bankruptcy of a co-surety : Held, that the latter was liable to an action for contribution, although he had obtained his certificate, inasmuch as one surety could not prove the value of the annuity under the commission against his co-surety; but that he could not *at law* be compelled to repay more than one third of the sum paid on account of the annuity, although the third surety had become insolvent at the time of such payment.

The grantor of an annuity assigned it, together with all securities, for a valuable consideration to *A.*, but part of the consideration-money belonged to *B.*, one of the co-sureties for payment of the annuity, and it was agreed by deed between *A.* and *B.* that the former should retain, out of the annual payments, sufficient to pay him the principal sum advanced, and interest; and that, when he should have been paid principal and interest, the annuity should be for the benefit of *B.* : Held, that the annuity was not thereby extinguished, but that it continued a subsisting annuity between the several co-sureties, and that *B.* having paid money to *A.* on account of it, the other sureties were liable to contribution.

Held, also, that although the stock assigned for further securing the annuity would ultimately vest in *B.*, by the deed made between him and *A.*, that did not discharge the other sureties. *Browne v. Lee*, E. 8 G. 4.

Page 689

satisfaction of his damages: Held, that the sheriff was not bound to pay the landlord half a-year's rent, then due, before he removed the goods. *Brandling v. Barrington*, E. 8 G. 4. Page 467

4. Where a sheriff's officer, to whom a warrant upon a writ against *A.* was delivered, sent a message to *A.* and asked him to fix a time to call and give bail, and *A.* accordingly fixed a time, attended, and gave bail: Held, that this was not an arrest, and that therefore an action for a malicious arrest would not lie against the party suing out the writ, although he had no cause of action. *Berry v. Adamson, Gent.*, E. 8 G. 4.

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5. Where *A.* by agreement made on the 31st of March, agreed to grant to *B.* a lease of certain premises, *habendum* from the 29th of September then next for 21 years, in consideration of 1000*l.* of which 10*l.* was paid at the time of the agreement, 90*l.* was to be paid on the 13th of April, and the residue on having possession of the premises, and *B.* being called upon to pay the 90*l.*, demanded an abstract of *A.*'s title, which was refused; whereupon he gave notice that he would rescind the contract, and commenced an action to recover the 10*l.* which he had paid: Held, that he was entitled to recover, it being proved at the trial that at the time when the action was commenced, *A.* had no power to grant the lease contracted for. *Roper v. Combes*, E. 8 G. 4.

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6. The master of a vessel bound on a voyage from *Lisbon* to *London* with a cargo of fruit and wine, the former, which was stowed above the wine, being deliverable at *Coxe's quay*, which is higher up the river *Thames* than the

London docks, where the wine was deliverable, put into the *London docks*, and while there, applied to the consignees of the fruit to allow the same to be landed there, but they refusing the vessel proceeded from the *London docks* towards *Coxe's quay*, under the charge of a pilot duly licensed for that purpose and while under his charge, ran foul of a barge and sunk it. An action brought by the owner of the barge: Held, that the vessel, not having reached the place at which she was to commence the delivery of her cargo, her removal from the *London docks* to that place was not a change of mooring within the statute 6 G. 4. c. 125. s. 63., so that the master, therefore, was bound by law to have a pilot on board her at the time when she ran foul of and sunk the barge and, consequently, the owners were discharged from responsibility. *M'Intosh v. Slade and Others*, E. 8 G. 4. Page 657

AFFIDAVIT.

See CORPORATION, 2.

AGREEMENT.

See ASSUMPSIT, LEASE, VENDOR AND VENDEE, 10.

ANNUITY.

1. It is not necessary that an annuity deed should be executed by all the parties to it before the memorial is enrolled pursuant to the 53 G. 3. c. 141. s. 2.

If the names of all the witnesses to the deed are inserted in the memorial, that is sufficient, without specifying the parties by whom the deed was executed in their presence. *Buckeridge v. Flight*, (in error) M. 7 G. 4. 49. 2. The

2. The same person being agent for the grantor of an annuity for the purpose of procuring the money, and also for the grantee for the purpose of paying over the consideration money to the grantor, at the time of executing the deeds for securing the annuity, paid over to the grantor the whole consideration money, but in pursuance of a previous agreement between the agent and the grantor, part of the consideration money, amounting to 15*l.* per cent upon the whole money, was returned by the latter to the agent for law expences and for brokerage; it was held that this was a return of part of the consideration money to the party advancing the same, within the meaning of the 53 G. 3. c. 141. s. 6., and the annuities were set aside upon the grantor's paying the principal and interest, together with reasonable costs and brokerage. *Finley v. Gardner*, H. 7 & 8 G. 4. Page 165
3. Where an annuity was granted by an indenture, which also contained a release of a former annuity: Held, that it was sufficient to describe the annuity deed in the memorial as a grant of an annuity. *Crowther v. Wentworth*, H. 7 & 8 G. 4. 366
4. Where *A.* purchased an annuity for his life, which was regularly paid up to the time of his death, but no memorial of the grant of annuity was enrolled: Held, that *A.*'s executrix could not on that ground insist that the contract was void, and recover back the consideration money paid for the annuity. *Davis, executrix of Griffiths, v. Bryan*, E. 8 G. 4. 651
5. Where an annuity-deed contained, besides covenants to pay the annuity, an assignment stock, for better securing the

nuity: Held, that it was well described in the memorial as a "grant of annuity."

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Held, also, that although *A.* had assigned for further security to *B.* a void instrument, the debt due to *B.* by the testator was still due to *B.* by reason of the fact that the testator had given *B.* the right to receive the value of the annuity.

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Page 27

ARBITRATOR

BANKRUPT.

of five persons, or their *representatives*, at any one time, otherwise than by devise or succession, (reckoning executors and administrators, as and for the single persons they represent, as to such interest as they are or shall be entitled to in right of such their testators or testator,) then and in every of the said cases, all liberties, privileges, and advantages vested in the patentees, their executors, administrators, or assigns, should cease, determine, and become void. The patentees having become bankrupt, and creditors exceeding five in number having proved under the commission, it was held that this clause applied only to an assignment by act of the party, and not to an assignment by operation of law, and consequently that the interest of the assignees of the bankrupt in the patent had not ceased. *Bloxam and Another, Assignees, v. Elsee, H. 7 & 8 G. 4.* Page 169

5. Where *A.*, having a debt from *B.* secured to him by a warrant of attorney, entered up judgment by *non sum informatus*, issued a *fi. fa.*, and took from the sheriff a bill of sale of the goods seized; *B.* having soon afterwards become bankrupt, his assignees took possession of and sold the goods so transferred to *A.*, who brought an action of trover for them: Held, that he was not "a creditor having security for his debt," within the 6 G. 4. c. 16. s. 108. and that he was entitled to recover. *Wymer v. Kemble and Masterman, E. 8 G. 4.* 479

6. Where the defendant in an action brought by the assignee of a bankrupt, intends to dispute the trading petitioning creditor's debt, or act of bankruptcy, the 6 G. 4. c. 16. s. 90. requires him

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to give specific notice of his intention, and it will not suffice to give notice that he intends to dispute the bankruptcy. *Trimley v. Unwin E. 8 G. 4.*

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7. One of three co-sureties for the payment of an annuity, paid money on account of the annuity after the bankruptcy of a co-surety: Held, that the latter was liable to an action for contribution, although he had obtained his certificate, inasmuch as one surety could not prove the value of the annuity under the commission against his co-surety, but that he could not *at law* be compelled to repay more than one third of the sum paid on account of the annuity, although the third surety had become insolvent at the time of such payment. *Browne v. Lee, E. 8 G. 4.* 689
8. Where a sheriff's officer had seized, under a *fi. fa.*, goods of a trader, more than sufficient to satisfy the levy, and the trader having become bankrupt, and assignees chosen before the goods were sold, the assignees authorised the officer to deliver the whole of the goods to *A. B.*, and to receive from him a certain sum as the value of the goods, which he did accordingly, and out of that money satisfied the execution creditor, but never paid over the residue to the assignees: Held, that they could not sue the sheriff for this money, the officer not having derived his authority to sell the whole of the goods from the sheriff, but from the plaintiffs the assignees. *Cook and Others, Assignees, v. Palmer, E. 8 G. 4.* 739

BARON AND FEME.

1. Where a deed was made between husband, wife, and a trustee, providing a separate maintenance
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BOND.

by law, which was less in amount than the stamp required for such a bill drawn in *England*; but there was nothing on the face of the bill to show that it had been drawn in *Ireland*. The holder, in *England*, neglected to present it for payment, and held it a month after it was due. The acceptor, having become bankrupt, the holder applied for payment to the indorsee, who had paid it to him. The latter refused to pay it, alleging that the holder had made it his own by his laches. The holder then threatened to sue him, alleging that the bill was void, on the ground that it was drawn on an improper stamp. The indorser suspected the bill, and finding that the stamp was not that required for a bill of the same amount drawn in *England*, but ignorant of the fact that it had been drawn in *Ireland*, paid the amount to the holder: Held, that this was money paid in ignorance of the fact, and there being no laches imputable to the party who paid the money, he might recover it back in an action for money had and received. *Milnes v. Duncan, E. 8 G.4.* Page 671

BOND.

A married man living in the same house with his wife, cohabited for six years with another woman, who knew that he was married, but until that time had conducted herself with propriety and morality. At the expiration of that time he ceased to cohabit with her, and gave her a bond to secure an annuity to her for her life, and the payment of a sum of money as a provision for her children which she had borne to him during such cohabitation: Held, that an action at law might be

CANAL. 751

maintained upon this bond. *Nye v. Moseley, M. 7 G.4.* Page 193

BRISTOL DOCK COMPANY.

See MANDAMUS, 1.

BROKER.

Where a broker made an entry of a contract in his book which he did not sign, but sent to the vendor and purchaser bought and sold notes, copied from the book and signed by him: Held, that these were a sufficient note or memorandum of the bargain, and that the parties were bound by the contract so made. *Goom v. Affulo, M. 7 G.4.* 117

CANAL.

By an act of parliament a canal company were bound to repair the banks of the canal. In an action brought by the company against the owner of adjoining land, for digging clay pits upon his own land, and causing the plaintiffs' banks to give way, there was some evidence to shew that the bank was not in good repair, but the learned judge directed the jury to find for the plaintiffs, if they thought that the falling in of the bank was caused by the defendant's having dug clay pits: Held, that the plaintiffs were not entitled to recover, unless at the time when the bank gave way it was in good repair, and that question not having been submitted to the jury, a new trial was granted. *Staffordshire Canal Company v. Hallen, H. 7 & 8 G. 4.* 317

CERTIORARI.

See PRACTICE, 10.

COAL MINES.

See POOR RATE, 2.

Surrejoinder, that *K.* and *T.*, before the election of the defendant, had been elected, admitted into, and exercised the office of aldermen, and at the election of the defendant were present as aldermen, and that before the defendant's election two other persons were elected, and admitted as capital burgesses in the room and stead of *K.* and *T.* Rebutter, that at the election of *K.* and *T.* as aldermen of the borough, the major part of the aldermen were not assembled, and that after the election of *K.* and *T.*, and before the election of the defendant as justice, and whilst *K.* and *T.* exercised the office of aldermen, informations in quo warranto were filed against them, and judgment of ouster given, with a traverse that *K.* and *T.* ever were aldermen. Demurrer: Held, that notwithstanding the judgment of ouster *K.* and *T.* could not be considered as having attended at the election of the defendant as capital burgesses, and that judgment must be for the crown. *The King v. Hubball*, M. 7 G. 4.

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2. Where a corporator has attended and voted at a meeting for the election of officers of the borough, he will not be allowed to become relator in quo warranto, and impeach the titles of the persons there elected on account of an objection to the title of the presiding officer, unless he shows that at the time of the election he was ignorant of the objection.

An affidavit to found a motion for quo warranto, is sufficient if it states the deponent's "information and belief," that the party against whom the application is made has exercised the office.

Where a person had an inchoate right to be a free burgess of a borough: Held, that his

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title could not be impeached, because he was sworn in before officers who were so *de facto*, but not *de jure*. *The King v. Slythe*, H. 7 & 8 G. 4. Page 240

COSTS.

See PROHIBITION, 2.

The defendant was arrested for 179*l.* At the trial a verdict was found for the plaintiff subject to the award of an arbitrator, to whom the cause and all matters in difference between the parties were referred, and the costs of the cause were to abide the *event of the award*. The arbitrator by his award found, that at the commencement of the suit there was due from the defendant to the plaintiff the sum of 45*l.* 10*s.* and that the plaintiff had no reasonable or probable cause for arresting the defendant for 179*l.* and that the defendant by reason thereof was entitled to compensation or damages to the amount of 20*l.* The arbitrator then ordered the verdict to be finally entered for the plaintiff for 25*l.* 18*s.* the balance due to him after deducting therefrom the damages awarded to the defendant. The Court refused to allow the defendant costs under the 43 G. 3. c. 46. inasmuch as by the terms of the reference, the costs were to abide the event of the award, and that was in favor of the plaintiff. *Thompson and Another, v. Atkinson*, H. 7 & 8 G. 4. 198

COURT OF GREAT SESSIONS IN WALES.

See MOTION FOR NEW TRIAL.

COVENANT.

1. Covenant, that defendant had not done nor *permitted nor suffered* to be done, any act whereby

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Thompson and another v. Atkinson, H. 7 & 8 G. 4. Page 193

2. Declaration stated, that before the making of the promise therein mentioned, certain differences had arisen, and a certain suit was depending in Chancery between *M. D.* and divers infants, plaintiffs, and *P. K.*, *T. B.*, since deceased, and *J. R.*, defendants;

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2. Where a sheriff's officer, to whom a warrant upon a writ against *A.* was delivered, sent a message to *A.* and asked him to fix a time to call and give bail, and *A.* accordingly fixed a time, attended, and gave bail: Held, that this was not an arrest, and that an action for a malicious arrest would not lie against the party suing out the writ, although he had no cause of action. *Berry v. Adamson, E. 8 G. 4.* 528
3. A constable having reasonable cause to suspect that a felony has been committed is justified in arresting the party suspected, although it afterwards appears that no felony has been committed. *Beckwith v. Philby and Others, E. 8 G. 4.* 635

ASSUMPSIT.

See PLEADING, 8.

1. Indebitatus assumpsit will lie for goods and chattels. *The Earl of Falmouth v. Penrose, H. 7 & 8 G. 4.* 385
2. The indorser of a bill being sued by the holder, paid him part of the sum mentioned in the bill: Held, that he might recover the same from the acceptor in an action for money paid to his use. *Pownal, Gent., one, &c. v. Ferrand, E. 8 G. 4.* 439
3. Where, by an instrument in writing (not under seal), *A.*, in consideration of 7000*l.*, agreed to present to a rectory, on the next avoidance, such person as *B.* should nominate, and to furnish an abstract, and execute a conveyance of the next presentation to *B.*: Held this agreement did not require an *ad valorem* stamp.
- A.*, afterwards, with the assent of *B.*, agreed to sell the next presentation to *C.*, and to convey such title as he (*A.*) had received in consideration of 7500*l.*, of which 500*l.* was to be paid to *B.* on a certain day. *A.* furnished an abstract of such title as he had; but *C.* refused to take it, and no conveyance was tendered to him. In an action by *B.* against *C.* for the 500*l.*: Held, that there was a sufficient consideration for *C.*'s promise to pay it; and that *A.* was not bound to make a marketable title, but only to convey such as he had received, and that as *C.* refused to accept that title, it was not necessary to tender a conveyance. *Wilmot v. Wilkinson, E. 8 G. 4.* 506
4. Where *A.*, by agreement made on the 31st of ~~May~~ 1789, agreed to grant to *B.* a ^{term} ~~habendum~~ of the 29th of September then for twenty-one years, in consideration of 1000*l.*, of which 10*l.* was paid at the time of the agreement, 90*l.* was to be paid on the 13th of April, and the residue on having possession of the premises; and *B.* being called upon to pay the 90*l.*, demanded an abstract of *A.*'s title, which was refused, whereupon he gave notice that he would rescind the contract, and commenced an action to recover the 10*l.* which he had paid: Held, that he was entitled to recover, it being proved at the trial, that at the time when the action was commenced, *A.* had no power to grant the lease contracted for. *Roper v. Coombes, E. 8 G. 4.* Page 534
5. Plaintiff having deposited money in the hands of the defendant, received from him the following memorandum: "Mr. T. has left in

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to give specific notice of his intention, and it will not suffice to give notice that he intends to dispute the bankruptcy. *Trimley v. Unwin E. 8 G. 4.*

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7. One of three co-sureties for the payment of an annuity, paid money on account of the annuity after the bankruptcy of a co-surety: Held, that the latter was liable to an action for contribution, although he had obtained his certificate, inasmuch as one surety could not prove the value of the annuity under the commission against his co-surety, but that he could not *at law* be compelled to repay more than one third of the sum paid on account of the annuity, although the third surety had become insolvent at the time of such payment. *Browne v. Lee, E. 8 G. 4.* 689
8. Where a sheriff's officer had seized, under a *f. fa.*, goods of a trader, more than sufficient to satisfy the levy, and the trader having become bankrupt, and assignees chosen before the goods were sold, the assignees authorised the officer to deliver the whole of the goods to *A. B.*, and to receive from him a certain sum as the value of the goods, which he did accordingly, and out of that money satisfied the execution creditor, but never paid over the residue to the assignees: Held, that they could not sue the sheriff for this money, the officer not having derived his authority to sell the whole of the goods from the sheriff, but from the plaintiffs the assignees. *Cook and Others, Assignees, v. Palmer, E. 8 G. 4.* 739

BARON AND FEME.

1. Where a deed was made between husband, wife, and a trustee, providing a separate maintenance for

Surrejoinder, that *K.* and *T.*, before the election of the defendant, had been elected, admitted into, and exercised the office of aldermen, and at the election of the defendant were present as aldermen, and that before the defendant's election two other persons were elected, and admitted as capital burgesses in the room and stead of *K.* and *T.* Rebutter, that at the election of *K.* and *T.* as aldermen of the borough, the major part of the aldermen were not assembled, and that after the election of *K.* and *T.*, and before the election of the defendant as justice, and whilst *K.* and *T.* exercised the office of aldermen, informations in quo warranto were filed against them, and judgment of ouster given, with a traverse that *K.* and *T.* ever were aldermen. Demurrer: Held, that notwithstanding the judgment of ouster *K.* and *T.* could not be considered as having attended at the election of the defendant as capital burgesses, and that judgment must be for the crown. *The King v. Hubball*, M. 7 G. 4.

Page 139

2. Where a corporator has attended and voted at a meeting for the election of officers of the borough, he will not be allowed to become relator in quo warranto, and impeach the titles of the persons there elected on account of an objection to the title of the presiding officer, unless he shows that at the time of the election he was ignorant of the objection.

An affidavit to found a motion for quo warranto, is sufficient if it states the deponent's "information and belief," that the party against whom the application is made has exercised the office.

Where a person had an inchoate right to be a free burgess of a borough: Held, that his

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title could not be impeached, because he was sworn in before officers who were so *de facto*, but not *de jure*. *The King v. Slythe*, H. 7 & 8 G. 4. Page 240

COSTS.

See PROHIBITION, 2.

The defendant was arrested for 179*l.* At the trial a verdict was found for the plaintiff subject to the award of an arbitrator, to whom the cause and all matters in difference between the parties were referred, and the costs of the cause were to abide the *event of the award*. The arbitrator by his award found, that at the commencement of the suit there was due from the defendant to the plaintiff the sum of 45*l.* 10*s.* and that the plaintiff had no reasonable or probable cause for arresting the defendant for 179*l.* and that the defendant by reason thereof was entitled to compensation or damages to the amount of 20*l.* The arbitrator then ordered the verdict to be finally entered for the plaintiff for 25*l.* 18*s.* the balance due to him after deducting therefrom the damages awarded to the defendant. The Court refused to allow the defendant costs under the 43 G. 3. c. 46. inasmuch as by the terms of the reference, the costs were to abide the event of the award, and that was in favor of the plaintiff. *Thompson and Another, v. Atkinson*, H. 7 & 8 G. 4. 193

COURT OF GREAT SESSIONS IN WALES.

See MOTION FOR NEW TRIAL.

COVENANT.

1. Covenant, that defendant had not done nor permitted nor suffered to be done, any act whereby

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a certain time, defendant did teach, &c., and that then the apprentice, without leave, quitted defendant's service, and never returned. Replication, that on, &c. defendant refused then, or ever, to receive back the apprentice, and thereby discharged him from his service. Rejoinder, that the apprentice enlisted as a soldier, and that plaintiff never requested defendant to receive back the apprentice when he was able to return to the service. Surrejoinder, that soon after the apprentice enlisted, defendant refused then, or ever, to take him back, and wholly discharged him from his service: Held, on demurrer, that the surrejoinder was bad, not being a sufficient answer to the rejoinder, and that the plea was good, as it disclosed a sufficient excuse for non-performance of the defendant's covenant. *Hughes v. Humphreys and Another*, E. 8 G. 4. 680

3. Where, by indenture between *A.* and *B.* of the first part, *C.* of the second part, and *D.* of the third part, *A.* and *B.* did, with the assent of *C.*, demise to *D.* for years, yielding and paying a certain rent to *E.* and the heirs

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ter could not maintain an ejectment against *A.* and *B.* without giving them a notice to quit. *Doe dem. Cates the elder, and Others, v. Somerville, M.* 7 G. 4.

Page 126

3. Where a deed was made between husband, wife, and a trustee, providing a separate maintenance for the wife, and purporting to be made in contemplation of an immediate separation, but, in fact, no separation then took place, nor was intended to take place at that time: Held, that the deed was void. *Hindley v. the Marquis of Westmeath, H.* 7 & 8 G. 4.

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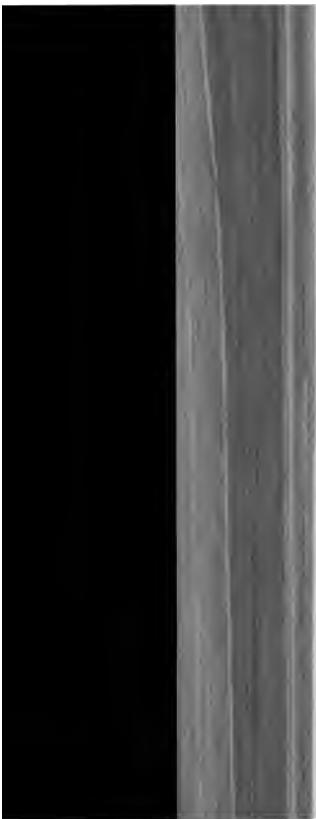
4. Where an estate was limited to *A.*, to the use of *A.* in trust for *B.*: Held, that *A.* took the legal estate, and that although he took it by the common law, and not by force of the statute of uses, yet the second use could not be executed by the statute. *Doe dem. Lloyd, v. Passingham, H.* 7 & 8 G. 4.
5. By the deed of settlement of a joint stock company it was provided, that the directors of the company should, without notice or summons, meet together at their office once in every week, on and at such day and hour as they should from time to time agree upon, and also at such other times as they should from time to time be convened, in manner thereafter mentioned, or adjourned to, and that three directors should be a board. By another clause, any three directors were empowered at any time to call a special board or meeting, by giving, under their hands, in writing, three days' notice to the other directors of the company, which notices were to be countersigned by the secretary, and to be sent by him two days prior to the time appointed for

such meeting: Held, that in order to constitute a good weekly meeting, without notice or summons, the day and hour of meeting must have been previously agreed upon by the directors, and therefore, that a meeting of three directors, without previous agreement on their part to meet on any fixed day or hour, was not a meeting duly convened within the meaning of the deed of settlement. *Moore and Others v. Hammond, E.* 8 G. 4. Page 456

DEVISE.

1. Where the devisee of an estate refused to take it, saying she was entitled as heir at law, and would not accept any benefit by the will of the devisor: Held, that this was not such a disclaimer as prevented her from afterwards bringing ejectment, and relying on her title as devisee. *Quære, whether a devise of an estate can be waived by parol. Doe on the demise of Jane Smyth v. Sir G. Smyth, M.* 7 G. 4. 112
2. Testator made a will duly executed to pass real estates, in the following terms: "I give and bequeath to my son *W.* 20*l.* extra more than any other of my sons; and likewise unto *A. B.*, my wife, the whole of my effects during her life; also the freehold estate which I now enjoy, I bequeath as follows: *A. B.*, my daughter, *J. B.* and *I. B.*, my sons, likewise *B. N.*, all the last-mentioned names to be all equal sums, whatever it may amount to, except any of the aforementioned should die, then their shares to be equally divided among the other that is surviving." Held, that the freehold estate was devised to *A. B.*, *J. B.*, *I. B.*, and *B. N.*, and that *B. N.* having been ousted by *A. B.*, might

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take an estate in fee, unless a contrary intent is clearly manifested on the face of the will; and therefore where *A.*, being seized in fee of freehold and copyhold lands, and having also leasesholds for lives and for years, and other personal property, devised and bequeathed to trustees, their heirs and assigns, all his lands, &c. freehold, copyhold, and leasehold, and all his personal estate in trust, to hold the copyhold and freehold, and all such other of his estates as were less than freehold, unto the trustees, their heirs, &c. for and during all his the testator's right, title, and estate therein upon trust, first to pay debts and funeral expences, and then to apply the annual income to the use of his two nieces for their lives; and after their decease, there were devises to their children and grandchildren, male and female, in terms so ambiguous and contradictory, as to make it doubtful what equitable interest the children or grandchildren took: It was held, that the trustees took an estate in fee in the freehold and copyhold lands, and an absolute interest in the leasesholds for

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- defeat the action : Held, that he thereby recognized it as a valid instrument, and that when produced in pursuance of notice from the defendants, it might be read in evidence without calling the subscribing witness to prove the execution by the grantor of the lease. *Doe on the demise of Tyndale and Others, v. Heming and Others, M. 7 G. 4.* Page 28
4. Replevin for taking plaintiff's corn in four closes. Avowry for rent arrear, stating that plaintiff held the closes in which, &c., at and under a certain yearly rent. Plea in bar, *non tenuit modo et formd.* It appeared in evidence that the tenant held the four closes mentioned in the declaration, and two others also, at the rent mentioned in the avowry : Held, that this evidence supported the avowry. *Hargrave v. Shewin and Digby, M. 7 G. 4.* 34
5. The vendor of a quantity of tin shipped the same on board a ship bound to *Leghorn* by the orders of the vendee. The captain, by his bill of lading, undertook to deliver the tin to an individual at *Leghorn*. The tin being heavy, was placed at the bottom of the hold, with other goods over it. The vendee having become bankrupt, the vendor required the captain to deliver up the tin, but did not tender the freight or offer to make any compensation to him for the trouble of unloading the vessel. The latter refused, alleging that he had signed a bill of lading to deliver the tin to another person : Held, that this was sufficient evidence of a conversion. *Thompson and Others, v. Trail and Others, M. 7 G. 4.* 36
6. Where *A.* had been tenant of certain premises, and upon his leaving them *B.* took possession : Held, that in the absence of any evidence to the contrary, it might be presumed that he came in as assignee of *A.*, although he never paid rent, and that notice to quit was rightly given to *B.* *Doe on the demise of Morris v. Williams, M. 7 G. 4.* Page 41
7. Where several felonies are so connected together as to form part of one entire transaction, evidence of them all may be given, in order to prove a party indicted guilty of one. *The King v. Ellis, M. 7 G. 4.* 145
8. Where the master and part-owner of a vessel who carried a cargo from St. John's, Newfoundland, to Bilboa, and delivered it there to the consignees (he having signed bills of lading making the cargo deliverable to the consignors or their assigns, he or they paying freight for the same) and took a bill for the freight which was afterwards dishonoured, and an action commenced against the consignors for the freight : Held, that the jury were properly directed to find for the defendants, if they thought that the captain took the bill voluntarily and for his own convenience, and that the defendants were not bound to prove that an offer was made to pay in cash. *Strong and Others v. Hart and Others, H. 7 & 8 G. 4.* 160
9. Upon the trial of an action for maliciously indicting the plaintiff, without reasonable or probable cause, the plaintiff proved a case, which, in the opinion of the learned judge, shewed that there was no reasonable or probable cause for preferring the indictment. The defendant then called a witness to prove an additional fact, and that being proved, the learned Judge was of opinion, 3 D 3 that

nonsuit the plaintiff. *Davis v. Hardy, H. 7 & 8 G.4.* Page 225

10. Declaration in debt for rent stated a demise of a messuage, land and premises with the appurtenances. The proof was of a demise of a messuage and land, together with the *furniture, utensils, and implements*: Held, that as the rent issued out of the real property, and not out of the furniture, it was sufficient for the plaintiff to allege and prove a demise of the real property, and therefore there was no variance. *Farewell v. Dickenson, H. 7 & 8 G.4.* 251

11. By an act of parliament a canal company were bound to repair the banks of the canal. In an action brought by the company against the owner of adjoining land for digging clay-pits upon his own land, and causing the plaintiffs' banks to give way, there was some evidence to shew that the bank was not in good repair; but the learned judge directed the jury to find for the plaintiffs if they thought that the falling in of the bank was caused by the defendant's having dug clay-pits: Held, that the plaintiffs were not entitled to recover, unless at the

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FERRY.

FRAUDS, STATUTE OF. 759

that the memorandum was admissible in evidence without a stamp.
Tompkins v. Ashby, E. 8 G. 4.

Page 541

17. In assumpsit brought to recover a sum of money, the defendant pleaded the statute of limitations, and upon that issue was joined. At the trial the plaintiff proved the following acknowledgement by the defendant within six years : " I cannot pay the debt at present, but I will pay it as soon as I can : " Held, that this was not sufficient to entitle the plaintiff to a verdict, no proof being given of the defendant's ability to pay. *Tanner v. Smart*, E. 8 G. 4. 603

EXCISE OFFICER.

See ACTION, 2.

FELONY.

See EVIDENCE, 7.

FENCE.

Where the owner of two adjoining closes, (*A.* & *B.*) separated by a fence and gate, which had always been repaired by the occupier of *B.*, sold *A.* to the plaintiff, and two years afterwards sold *B.* to the defendant: Held, that the latter was not bound to repair the gate, unless he or his vendor had made some specific bargain with the plaintiff to that effect; and that the doing of occasional repairs was not evidence of such bargain. *Boyle v. Tamlyn*, H. 7 & 8 G. 4. 329

FERRY.

The owner of a ferry demised it to *A.* by parol at a certain annual rent. The latter, at the end of a few weeks, finding it unprofitable, proposed to become the servant of the former as boatman, and to account to him for all money re-

ceived from passengers, upon being allowed fixed daily wages. This was assented to by the owner of the ferry, and *A.* became his servant, and received the stipulated wages: Held, that there was a surrender of *A.*'s interest in the ferry by act and operation of law.

In an action on the case for the disturbance of a ferry, it is sufficient for the plaintiff to prove that he was in possession of the ferry at the time when the cause of action arose. It is not necessary for the plaintiff to allege in his declaration, or to prove at the trial, the payment of any specified sum for passage money.

Neglect of duty on the part of the owner of the ferry is no answer to the action, although the crown may, on that ground, repeal the grant by scire facias or quo warranto.

The owner of a ferry must have a right to use the land on both sides of the water for the purpose of embarking and disembarking his passengers, but he need not have any property in the soil on either side.

Qu. Whether a ferry can be demised without deed? *Peter v. Kendal and another*, E. 8 G. 4.

Page 703

FOOTWAY.

See HIGHWAY.

FORGERY.

See MONEY HAD AND RECEIVED.

FRAUDS, STATUTE OF.

See BROKER, 1.

1. *A.*, on the 4th of January, agreed to sell to *B.* a stack of hay, for the sum of 145*l.*, to be paid on the 4th of February, the same to be allowed to stand on *A.*'s premises until the 1st of May.

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tax," should be issuing out of the lands to be inclosed, and other lands in the parish, and be paid to the rector in lieu of all great and small tithes, &c.: Held, that this corn-rent was not liable to be assessed to the relief of the poor. *Mitchell, Clerk, v. Fordham, H. 7 & 8 G. 4.* Page 274

INDICTMENT.

See HIGHWAY. NUISANCE.

In an indictment for making a false affidavit, it is sufficient to state that the defendant came before *A. B.* and took his corporal oath (*A. B.* having power to administer an oath), without setting out the nature of *A. B.*'s authority.

When perjury is assigned upon several parts of an affidavit, those parts may be set out in the indictment as if continuous, although they are in fact separated by the introduction of other matter. *The King v. Callanan, M. 7 G. 4.* 102

INQUISITION.

See CORONER.

A coroner's inquest omitted to state the place where the death happened, or where the body was found; the names of the jurors were not inserted in the body of the inquisition, and it was subscribed by them with the initials only of their christian names: Held, that these were defects in substance, and could not be amended, and the inquisition was quashed.

The inquisition found that the death was occasioned by a coach and horses, the property of *A.* and *B.* and Co.: Held, that this finding could not be altered upon affidavits that the property was in *A.* and *B.* alone. *The King v. Everett, H. 7 & 8 G. 4.* 247

INSOLVENT ACT.

See WARRANT OF ATTORNEY, I. Where a party is arrested for a debt from which he has been discharged under the insolvent act, and gives bail, the Court will order the bail-bond to be delivered up to be cancelled. *Norton, Gent., one &c. v. Moseley, M. 7 G. 4.* Page 106

INSURANCE.

Where in assumpsit on a policy of insurance on goods by a certain ship, it was proved that she sailed on the voyage insured with the goods on board, and never arrived at her port of destination, and that a few days after her departure, a report was heard at the place whence she sailed, that the ship had foundered at sea, but that the crew were saved: Held, that this was sufficient *prima facie* evidence of a loss by perils of the sea, and that the plaintiff was not bound to call any of the crew, or to shew that he was unable to procure their attendance. *Koster v. Reed, Bart. and Another, M. 7 G. 4.* 19

JOINT STOCK COMPANY.

By the deed of settlement of a joint stock company, it was provided that the directors of the company, should without notice or summons meet together at their office once in every week, on and at such day and hour as they should from time to time agree upon, and also at such other times as they should from time to time be convened in manner thereafter mentioned or adjourned to, and that three directors should be a board. By another clause, any three directors were empowered at any time to

mons, the day and hour of meeting must have been previously agreed upon by the directors, and, therefore, that a meeting of three directors, without previous agreement on their part to meet on any fixed day or hour, was not a meeting duly convened within the meaning of the deed of settlement. *Moore and Others, v. Hammond*, E. 8 G.4. Page 456

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JUDGMENT, AS IN CASE OF
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See PRACTICE, 5. 8.

JUSTICES.

See PRACTICE, 10.

1. Where the justices of a borough, who had exclusive jurisdiction within the borough itself, but jurisdiction concurrent with that of the county justices over certain places called the liberties of the borough: Held, that for an offence committed within the liberties they might commit to the county gaol, and cause the prisoner to be brought before them for trial at the borough sessions. *The King v. Musson*, M. 7 G. 4.

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2. Where a single woman, having

valid conveyance, and to pass the legal estate to the trustee.

The rector succeeded to the rectory, upon the death of the former incumbent, in April 1816. *A.* and *B.* were then in possession of the glebe lands, having been tenants of the former incumbent, and they continued in possession until after December 1816, when the rector conveyed them to the trustee for securing the annuity : Held, that the latter could not maintain an ejectment against *A.* and *B.* without giving them a notice to quit. *Doe dem. Cates and Others v. Somerville and Others*, M. 7 G. 4. Page 126

3. Where certain goods upon a farm were seized by virtue of a writ of *pone per vadis* against the occupier, issued out of the court of pleas at Durham, and were afterwards upon his default forfeited to the bishop, who by writ to the sheriff, ordered them to be assigned to the party at whose suit the pone issued, in satisfaction of his damages: Held, that the sheriff was not bound to pay the landlord half a year's rent then due, before he removed the goods. *Brandling v. Barrington*, E. 8 G. 4. 467

4. Where, in an agreement for the sale and assignment of certain premises, there was a stipulation "that in the meantime, and until the assignment was made, the intended purchaser should pay and allow to the seller at the rate of 100*l.* per annum from the time of taking possession of the premises until the completion of the purchase;" the intended purchaser having taken possession, and one half yearly payment having become due before the completion of the purchase: Held, that it was due as *rent*, and that the sheriff levying on the goods of the occupier under a *fi. fa.* was bound

by the 8 *Ann. c. 14.* to pay it over to the seller, as landlord. *Saunders v. Musgrave, Bart.* E. 8 G. 4. Page 524

LEASE.

1. By agreement, *A.* stipulated that he would, as soon as he should become possessed of a certain public-house, execute a lease thereof to *B.*, from the 21st December 1825, for fourteen or twenty-one years. At the time of making the agreement the house was upon lease, which would not expire till Midsummer 1827. The legal estate being in trustees, first to pay debts, and then to pay an annuity, and subject thereto to the use of *A.*, if he attained twenty-four. In June 1825, after *A.* had attained twenty-four, but before the outstanding lease had expired, he and the trustees joined in a lease to *C.* for twenty-three years: Held, that *A.* having thereby put it out of his power, so long as the latter lease of 1825 subsisted, to grant any lease to *B.*, had committed a breach of his agreement, and was liable to an action for a breach of that agreement, although the first lease had not expired. *Ford v. Tiley*, H. 7 & 8 G. 4. 925

2. Where a lease contained a proviso "that if the rent should be in arrear for twenty-one days after demand made, or if any of the covenants should be broken, then the term thereby granted, or so much thereof as should be then unexpired should cease, determine, and be wholly void; and it should be lawful to and for the landlord upon the demised premises wholly to re-enter and the same to hold to his own use, and to expel the lessee;" Held, that this, in the event of a breach of covenant, made the lease voidable

able and not void; and that the landlord was bound to re-enter in order to take advantage of the forfeiture, and that he waived it by a subsequent receipt of rent.
Arnsby v. Woodward, *E. 8 G. 4.*
 Page 519

LIBEL.

A declaration for a libel, after certain introductory matter which was immaterial, because not properly connected with the libel, set out the following publication of and concerning the plaintiff; "Society of guardians for the protection of trade against swindlers and sharers, &c., I (meaning the defendant) am directed to inform you that *A. B.* (meaning plaintiff,) and *C. D.* are reported to this society as improper to be proposed to be ballotted for as members thereof," (meaning that the plaintiff was a swindler and sharper, and an improper person to be a member of the said society). Plea, the general issue, after verdict for the plaintiff: Held, in arrest of judgment, that the inuendo was not warranted by the libel, and that the words of the libel unexplained by introductory matter were not actionable. *Goldstein v. Foss and another*, *H. 7 & 8 G. 4.* 154

LIMITATIONS, STATUTE OF.

In assumpsit brought to recover a sum of money, the defendant pleaded the Statute of Limitations, and upon that issue was joined. At the trial, the plaintiff proved the following acknowledgment by the defendant within six years, — "I cannot pay at present, but I will pay it as soon as I can :" Held, that this was not sufficient to entitle the plaintiff to a verdict, no proof being given of the defendant's ability

to pay. *Tanner v. Smart*, *E. 8 G. 4.* Page 603

LIQUIDATED DAMAGES.

See PLEADING, 6.

MALICIOUS ARREST.

See ARREST, 2.

MALICIOUS PROSECUTION.

Upon the trial of an action for maliciously indicting the plaintiff without reasonable or probable cause, the plaintiff proved a case which, in the opinion of the learned judge, shewed that there was no reasonable or probable cause for preferring the indictment. The defendant then called a witness to prove an additional fact, and that being proved, the learned judge was of opinion that there was reasonable or probable cause for preferring the indictment: Held, that there being no contradictory testimony as to that fact, and there being nothing in the demeanor of the witness who proved it to impeach his credit, the learned judge was not bound to leave it to the jury to find the fact, but that he might act upon it as a fact proved, and nonsuit the plaintiff. *Davis v. Hardy*, *H. 7 & 8 G. 4.* 225

MANDAMUS.

By act of parliament empowering certain persons to make a floating harbour at *Bristol*, it was enacted, "that it should and might be lawful for the directors of the *Bristol Dock Company*, and they were thereby authorised and required to make a common sewer in a certain direction therein specified, and also to alter and reconstruct all or any of the sewers of the said city at the mouths thereof,

MONEY HAD AND RECEIVED. NOTICE OF ACTION. 765

thereof, so and in such manner that the sewers might be discharged considerably under the surface of the water in the floating harbour, and also to make such other *alterations and amendments* in the sewers of the said city as might or should be necessary in consequence of the floating of the said harbour." The directors altered several of the sewers, so as to discharge them considerably under the surface of the water in the floating harbour, but the sewage there discharged was so offensive as to be a nuisance to the neighbourhood : Held, that, under the latter part of the clause above set forth, the directors were authorised and *required* to make a new sewer, if necessary, to remove the nuisance.

A writ of mandamus commanded the directors "to make such alterations and amendments in the sewers as were necessary in consequence of the floating of the harbour :" Held, that this was in the proper form, and that it was neither requisite nor proper to call upon the Company to make any specific alteration, the mode of remedying the evil being left to their discretion by the act of parliament. *Rex v. The Bristol Dock Company, H. 7 & 8 G. 4.*

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MASTER AND APPRENTICE.

See COVENANT, 2.

MILITIA MAN.

See SETTLEMENT BY HIRING AND SERVICE, 2.

MONEY HAD AND RECEIVED.

See BILL OF EXCHANGE, 4.
PARTNERSHIP.

A. B. and C. were proprietors of stock as trustees, and C. D. and

*E. were bankers. C. executed a letter of attorney empowering D. and E. to sell the stock, and forged the signature of A. and B. The stock was sold and transferred in the books of the bank of *England* to the credit of the buyers, and the produce of the stock was paid into the banking-house of C. D. and E. C. was afterwards tried and convicted of forging a similar instrument, and executed : Held, upon an issue directed by the Lord Chancellor, it being part of the order that no objection should be taken that he was interested as a trustee, and a partner in the banking-house ; that the money received by the banking-house constituted a debt due from them to the trustees. *Stone and Another v. Marsh and Others, 8 G. 4.**

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MOTION FOR A NEW TRIAL.

A party in an action tried before the Court of Great Sessions in *Wales*, may move for a new trial without entering into the recognizance required by the statute. *5 G. 4. c. 106. s. 4. Howell v. Howell, E. 8 G. 4.*

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NOTICE OF ACTION.

A statute enacted that no plaintiff should recover in any action commenced against any person for any thing done or performed in execution, or under the authority of the act, unless notice thereof in writing should be previously given, twenty-eight days before the commencement of the action : Held, that a notice was necessary in those cases only in which the party against whom the action was brought had reasonable ground for supposing that the thing done by him was done in execution of, or under the

a nuisance in a navigable river, by erecting staiths there for loading ships with coals, the jury were directed by the learned judge to acquit the defendants if they thought that the abridgement of the right of passage occasioned by these erections was for a public purpose, and produced a public benefit; and if the erections were in a reasonable situation, and a reasonable space was left for the passage of vessels on the river; and he pointed out to the jury, that by means of the staiths coals were supplied at a cheaper rate, and in better condition than they otherwise could be, which was a public benefit: Held, by *Bayley* and *Holroyd*, Js., that this direction to the jury was proper; *Lord Tenterden C. J. diss.* *Rex v. Russell and Others*, E. 8 G. 4.

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PARISH.

See POOR RATE, 3.

PARTNERSHIP.

See MONEY HAD AND RECEIVED, 1.

Where two persons jointly under-

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with his assent, it was held that the assignees of *A.* were entitled to be allowed those sums in account. *Shaw and Others, Assignees, v. Dartnall*, M. 7 G. 4. 56

2. Where the master and part-owner of a vessel, who carried a cargo from St. John's, Newfoundland, to Bilboa, and delivered it there to the consignees (he having signed bills of lading, making the cargo deliverable to the consignors or their assigns, he or they paying freight for the same), and took a bill for the freight, which was afterwards dishonoured, and an action commenced against the consignors for the freight: Held, that the jury were properly directed to find for the defendants, if they thought that the captain took the bill voluntarily, and for his own convenience, and that the defendants were not bound to prove that an offer was made to pay in cash. *Strong and Others, v. Hart and Others*, H. 7 & 8 G. 4. Page 160

PATENT.

By an act for enlarging the term granted to a patentee for the enjoyment of his patent, it was enacted, that in case the power, privilege, or authority granted by the letters patent, should at any time become vested in, or in trust for, more than the number of five persons, or their *representatives*, at any one time, otherwise than by devise or succession (reckoning executors and administrators as and for the single persons they represent as to such interest as they are or shall be entitled to in right of such their testators or testator), then and in every of the said cases, all liberties, privileges, and advantages, vested in the patentees,

their executors, administrators, or assigns, should cease, determine, and become void. The patentees having become bankrupt, and creditors exceeding five in number, having proved under the commission, it was held, that this clause applied only to an assignment by act of the party, and not to an assignment by operation of law; and, consequently, that the interest of the assignees of the bankrupt in the patent had not ceased.

The patent was for a machine for making paper in single sheets without seam or joining, from one to twelve feet and upwards wide, and from one to forty-five feet and upwards in length: Held, that this imported that paper, varying in width between those extremes, should be made by the same machine; and that the patentee, at the time of taking out the patent, not having any machine capable of producing paper of different widths, the patent was void. *Blozam and Another, Assignees, v. Elsee*. H. 7 & 8 G. 4. Page 169

PENALTY.

See PLEADING, 6.

PERJURY.

See INDICTMENT.

PILOT.

See ACTION, 6.

PLEADING.

1. Replevin for taking plaintiff's corn in four closes, avowing for rent arrear, stating that plaintiff held the closes in which, &c. at and under a certain yearly rent. Plea in bar, *non tenuit modo et formā*. It appeared in evidence that the tenant held the four closes

poral oath (*A. B.* having power to administer an oath) without setting out the nature of *A. B.*'s authority.

When perjury is assigned upon several parts of an affidavit, those parts may be set out in the indictment as if continuous although they are, in fact, separated by the introduction of other matter. *The King v. Callanan*, M. 7 G. 4.

102

3. Where a person who has become bankrupt is sued for a cause of action accruing before his bankruptcy, and pending the suit and before trial obtains his certificate, he must plead it *puis d'arrein continuance*; and if he neglects to do so, and judgment is obtained against him, he cannot plead his certificate to an action on such judgment. *Todd and Others v. Maxfield*, M. 7 G. 4. 105

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4. A declaration for a libel after certain introductory matter which was immaterial because not properly connected with the libel, set out the following publication of and concerning the plaintiff: "Society of guardians for the protection of trade against swindlers and sharpers, &c. I (meaning defendant) am directed to inform

liquidated damages: Held, that this sum was a penalty and not *liquidated damages*.

In an action against *A.* for breach of the agreement for carrying on the business within five miles, he pleaded, that *B.* did not well and truly pay and discharge the two several bills of exchange according to the agreement, but therein made default, and that thereby the said sum of 500*l.* mentioned in the agreement became forfeited; and he further pleaded, that before the commencement of the suit, *B.* was indebted to him (*A.*) in the further sum of 500*l.* for work and labour, &c.

Replication (except as to so much of the plea as related to the first sum of 500*l.* therein mentioned), that the plaintiff in 1825 had become bankrupt and obtained his certificate; and as to so much of the plea as related to that sum, there was a demurrer: Held, that the plaintiff was entitled to judgment upon the demurrer, although it appeared by other parts of the record, that since the making of the agreement he had become bankrupt, and his interest in the agreement had vested in his assignees. *Davies v. Penton, H. 7 & 8 G. 4.* Page 216

7. Declaration in debt for rent stated a demise of a messuage, land and premises, with the appurtenances. The proof was of a demise of a messuage and land, together with the furniture, utensils, and implements: Held, that as the rent issued out of the real property, and not out of the furniture, it was sufficient for the plaintiff to allege and prove a demise of the real property, and therefore there was no variance. *Farewell v. Dickenson, H. 7 & 8 G. 4.* 251

8. In a declaration on the case, one count stated that plaintiff, at

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the request of the defendant, had caused to be delivered to him certain boars, pigs, &c., to be taken care of by the defendant for plaintiff, for reward to him, defendant, and in consideration thereof defendant undertook, and then and there *agreed* with the plaintiff to take care of the boars, &c., and to *redeliver* the same on request: Held, on motion in arrest of judgment, that this was a count in assumpsit, and could not be joined with counts in case. *Corbet v. Packinton, Bart., H. 7 & 8 G. 4.* Page 268

9. Where in pleading an equivocal expression is used, in general that is to be construed against the party using it; but if the opposite party pleads over, it is to be construed in that sense which will support the previous pleadings.

Covenant that defendant had not done, nor *permitted, nor suffered* to be done any act whereby an estate was encumbered: Held, that assenting to an act which the covenantor could not prevent, was not a breach of the covenant. *Hobson and Another v. Middleton, H. 7 & 8 G. 4.* 295

10. *A.* having in his warehouse a quantity of sugar, in bulk, more than sufficient to fill 20 hogsheads, agreed to sell 20 hogsheads to *B.*, but there was no note in writing of the contract sufficient to satisfy the statute of frauds. Four hogsheads were delivered to and accepted by *B.*: *A.* filled up and appropriated to *B.* sixteen other hogsheads, and informed him that they were ready, and desired him to take them away. *B.* said he would take them as soon as he could: Held, that the appropriation having been made by *A.*, and assented to by *B.*, the property in the 16 hogsheads thereby passed to the latter,

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event happened, although that event have not happened. *Vavasour v. Ormrod*, E. 8 G. 4. 490

12. Covenant by the father of an apprentice against the master for not teaching and providing for the apprentice. Plea, that up to a certain time defendant did teach, &c. and that then the apprentice, without leave quitted defendant's service, and never returned. Replication, that on &c., defendant refused then, or ever, to receive back the apprentice, and thereby discharged him from his service. Rejoinder, that the apprentice enlisted as a soldier, and that plaintiff never requested defendant to receive back the apprentice when he was able to return to the service. Surrejoinder, that soon after the apprentice enlisted, defendant refused then, or ever to take him back, and wholly discharged him from his service: Held, on demurrer, that the surrejoinder was bad, not being a sufficient answer to the rejoinder, and that the plea was good, as it discloses a sufficient excuse for nonperformance of the defendant's covenant. *Hughes v. Humphreys and Another*, E. 8 G. 4. 680

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the same proportion as other personal property should be assessed: Held, that land of the company used by them for the purpose of the canal was rateable qua land, not in respect of its improved value, but in respect of that which would have been its value, if it had not been used for the purposes of the canal.

The company had, on the margin of a large basin, a piece of land adjoining the private yard of a timber-merchant. This piece of land next the basin consisted of natural ground; it was not faced with brick or timber, and the ground below the water gradually sloped down to the bottom of the basin. The timber-merchant landed his timber upon this piece of land, and it was there marked and measured by the revenue officers. No acknowledgement or rent was paid to the company for this privilege of landing the goods there, but their rates and duties were increased, a greater number of ships entering the basin in consequence of this privilege: Held, that this piece of land was not a wharf within the meaning of the act of parliament, and was not liable to be rated as such to the relief of the poor. *Rex v. Company of Proprietors of the Regent's Canal*, E. 8 G. 4. Page 720

POOR, REMOVAL OF.

An order of removal signed by two justices, one of whom at the time was churchwarden of the removing parish, is bad. *Rex v. Inhabitants of Great Yarmouth*, E. 8 G. 4. 646

PRACTICE.

- Where a party held to bail obtains time to put in bail to the action, he cannot afterwards ob-

ject to the writ for irregularity.
Moore v. Stockwell, M. 7 G. 4.

Page 76

- One of the wardens of the Tower was arrested, and informed at the time that the plaintiff would be satisfied if he would enter an appearance. He, however, claimed his privilege, but afterwards executed a bail-bond. The Court refused to order the bail-bond to be delivered up to be cancelled. *Bidgood v. Davies and Another*, M. 7 G. 4. 84
- A charge in an attorney's bill for attending at a lock-up house, and obtaining defendant's release and filling up the bail-bond, is a charge at law within the statute 2 G. 2. c. 23. s. 28., and renders the bill subject to taxation. *Fearne v. Wilson*, M. 7 G. 4. 86
- Where a party is arrested for a debt from which he has been discharged under the insolvent act, and gives bail, the Court will order the bail-bond to be delivered up to be cancelled. *Norton, Gent., one, &c. v. Moseley*, M. 7 G. 4. 106
- Where separate actions were brought against several persons for the same debt, who (if at all) were jointly liable, the defendant in one action having paid the debt and costs in that action, the Court stayed the proceedings in the others without costs. *Carne and Others v. Legh*, M. 7 G. 4. 124

- Where a cause in London was made a remanet from the sittings after Easter to the sittings after Trinity term, and the plaintiff then made default: Held, that the defendant was entitled to move for judgment as in case of nonsuit. *Ham v. Greg*, M. 7 G. 4. 125

- Where the Christian name of the defendant is omitted in the latitat, the Court will (if the process be

bailable) set aside the proceedings on motion ; but if it be serviceable only, they will not interfere on motion, but leave the defendant to plead in abatement. *Rolph v. Peckham*, H. 7 & 8 G. 4. Page 164
 8. In an action against the marshal for an escape, the bill was entitled generally of Michaelmas Term, and the escape was alleged to have taken place on the 15th of November. There was a special demurrer, for that the cause of action appeared to have accrued after the first day of the term to which the bill had relation. The Court allowed the plaintiff to amend on payment of costs, although it appeared by affidavit that the prisoner had returned into the custody of the marshal before any application for liberty to amend was made. *Brazier v. Jones*, H. 7 & 8 G. 4.

196

9. Bail in error were put in, in the vacation, and excepted to, and the plaintiffs in error gave notice that they would justify on the first day of the next term ; they did not so justify : Held, that the bail were not entitled to have an exoneretur entered on the bail-piece. *Adnam v. Wilks, Gent., one, &c.* H. 7 & 8 G. 4.

287

10. Where husband and wife commenced an action for money lent by the wife before marriage, and she died pending the action : Held, that it thereby abated, and that defendant could not afterwards have judgment as in case of nonsuit. *Chechi et Uz. v. Powell and Others*, H. 7 & 8 G. 4.

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11. It is not necessary that a writ of sequestration should be published before the return day of the levavi facias upon which it is founded, or that a copy of it should be affixed on the church-

PROHIBITION.

door, where that is not the mode of publication in the place where the benefice is situated. *Bennett perley, Clerk*, E. 8 G. 4. Pt 12. Where justices to whom titorari was directed, sign return without putting their names to it, or adding their names as justices, the Court sent the return to be amended. *v. Kenyon*, E. 8 G. 4.

PRINCIPAL AND AGENT.

A. employed B., an attorney, to enforce payment of a debt directed his agent to sue the justices in the county. Before the return of the justices the debtor paid debt and costs to B. His agent, not knowing such payment, afterwards entered judgment in the county court, although the defendant had appeared, and sued out execution under which the goods of debtor were seized : Held, A. and B. were liable as trustees. *Bates v. Pilling and another*, M. 7 G. 4.

PRIVILEGE.

One of the wardens of the Tower was arrested, and informed the time that the plaintiff would be satisfied if he would enter his appearance. He, however, claimed his privilege, but afterwards executed a bail-bond. The Court refused to order the bail-bond to be delivered up to be cancelled. *Bidgood v. Daub and Another*, M. 7 G. 4.

PROBABLE CAUSE.

See MALICIOUS PROSECUTION

PROHIBITION.

1. In prohibition a writ of error is allowed after a writ of consultation.

RECOGNIZANCE.

- has been delivered to the Court below, is not a supersedeas.—
Free, D. D. v. Burgoyne, M. 7 G. 4. Page 27
2. The plaintiff in prohibition is not entitled to costs, except in cases provided for by the statute 8 & 9 W. 3. c. 11. s. 3., and where the judgment on the demurrer to a declaration in prohibition was, that a writ of prohibition issue as to proceeding on part of the matters contained in the libel, with a view to a particular object, and a writ of consultation as to proceeding upon them for any other purpose, and as to all other matters in the libel : Held, that this was not within the statute. *Free, D. D. v. Burgoyne, E. 8 G. 4.* 538

PROMISSORY NOTE.

See BILL OF EXCHANGE, 1, 2.

PROMOTIONS.

Pages 1. 402.

PROVISO.

See PLEADING, 11.

PUIS DARREIN CONTINUANCE.

See BANKRUPT, 3.

QUO WARRANTO.

See CORPORATION, 2.

REAL ESTATE.

See WILL, 1.

RECTOR.

See DEED, 2.

RECOGNIZANCE.

See MOTION FOR A NEW TRIAL.

RENT,

See VENDOR AND VENDEE.

SETTLEMENT. 779

RULES OF COURT.

Pages 123. 267. 639.

SALE.

See STAMP, 1.

SEQUESTRATION.

See PRACTICE, 11.

SETTLEMENT — by Apprenticeship.

A master shoemaker made a proposal to a poor woman to take her son to learn his business ; the son was to serve him for four years, to board and lodge with his mother, and to have half what he earned. No indentures were executed on account of the poverty of the mother : Held, that this was a defective contract of apprenticeship, and not a contract of hiring, and, consequently, that the pauper did not gain any settlement by serving under it. *The King v. The Inhabitants of St. Margaret's, King's Lynn, M. 7 G. 4.* Page 97

SETTLEMENT — by Hiring and Service.

1. A hiring at 6s. a week for the winter and 9s. a week for the summer, nothing being said as to the duration of the service, is not a yearly hiring. *The King v. The Inhabitants of Warminster, M. 7 G. 4.* 77
2. A. being enrolled as a substitute in the militia, hired himself for a year and performed a year's service under that contract : Held, that as it did not appear that the pauper at the time of hiring informed the master that he was a militia man, no settlement was gained by serving a year under such contract. *The King v. Holsworthy, H. 7 & 8 G. 4.* 283

SETTLEMENT — by Renting a Tenement.

1. Where a house of the annual value of 10*l.* was hired by *A.* at Michaelmas, and he died three days before the year expired, but his corpse continued in the house after the expiration of the year, and after his death his widow resided there, and afterwards paid the year's rent: Held, that *A.*'s widow and children did not gain any settlement. *Rex v. The Inhabitants of Crayford, M. 7 G. 4.* Page 68
2. It is not necessary to the gaining of a settlement by coming to settle upon a tenement, that the pauper should reside upon any part of it. *The King v. The Churchwardens and Overseers of Kenardington, M. 7 G. 4.* 70
3. A pauper held a house at the annual rent of 8*l.* from Lady Day to Michaelmas, 1821, and a different house from Michaelmas, 1821, to Lady Day, 1822, at the annual rent of 9*l.*, and during the whole of that period, he was tenant of a garden, at an annual rent of two guineas; but he had agreed with another person that they should share the expence and the profits arising from the cultivation of the garden, and that person paid him half of the rent, but he paid the whole to the landlord: it was held, that he did not gain a settlement, because he did not during the whole year, as required by the 59 G. 3. c. 50. hold a house and occupy land which together were of the annual value of 10*l.* *The King v. The Inhabitants of Tonbridge, M. 7 G. 4.* 88
4. The statute 59 G. 3. c. 50. makes the payment of a year's rent by the person hiring a tenement, a condition precedent to the gaining of a settlement by reason of dwelling therein for forty days. The statute 6 G. 4. c. 57. repeals that statute, but still makes the payment of the year's rent, but not by the party having the same a condition precedent to the gaining of a settlement, and therefore where a person after the passing of the 59 G. 3. c. 50. hired a tenement of the annual value of 10*l.* and held it for more than a year, but died before a whole year's rent was paid, he was held to gain no settlement, although after his death, and after the passing of the 6 G. 4. c. 57., the rent was paid out of money produced by the sale of his goods. *The King v. The Inhabitants of Carshalton, M. 7 G. 4.* Page 93
5. By the statute 6 G. 4. c. 57. it is enacted, that no settlement shall be gained by reason of settling upon or paying parochial taxes for a tenement, unless the house, or building, or land (of which the tenement consists) shall be occupied under such yearly hiring, and the rent for the same, to the amount of 10*l.*, be actually paid for the term of one whole year: Held, that no settlement is gained by settling upon a tenement, unless the rent for the term of one whole year, whatever be its amount, be actually paid. *Rex v. Inhabitants of Ramsgate, E. 8 G. 4.* 712
6. Where a shepherd served a farmer for two years under an agreement for "12*s.* per week, and to have twenty-one ewes going:" Held, that this contract only gave the shepherd a right to have his ewes fed in the same manner as his master's flock, either on pasture or on dry food, and that, therefore, the pauper did not gain any settlement in *T.*, although the feed of the ewes was worth more than 10*l.* a year, it not being any part of the bargain that

that the sheep should be pasture fed. *Rex v. Inhabitants of Thornham*, E. 8 G. 4. Page 733

SEWER.

See MANDAMUS.

SHERIFF.

*See ACTION, 3. VENDOR AND
VENDEE, 10.*

Where a sheriff's officer seized under a*f. i. fa.* goods of a trader, more than sufficient to satisfy the levy, and the trader having become bankrupt, and assignees chosen before the goods were sold, the assignees authorized the officer to deliver the whole of the goods to *A.* *B.* and to receive from him a certain sum as the full value of the goods, which he did accordingly, and out of that money satisfied the execution creditor, but never paid over the residue to the assignees: Held, that they could not sue the sheriff for this money, the officer not having derived his authority to sell the whole of the goods from the sheriff, but from the plaintiff, the assignees. *Cook and Others, Assignees, v. Palmer*, E. 8 G. 4. 739

SPECIAL SESSIONS.

See HIGHWAY.

STAMP.

- Where two persons, who had entered into certain contracts with the victualling-office, agreed to dissolve partnership, and executed a deed, whereby one agreed to resign to the other all his interest in those contracts, all debts due to the concern, and all his share of the partnership property, and the other agreed to pay him 50,000*l.*, at which sum his share and interest was valued:

Held, that this was not a sale of property within the meaning of the 49 G. 3. c. 149., and did not require an *ad valorem* stamp. *Belcher v. Sikes and Others, H.* 7 & 8 G. 4. Page 234

- Where, by an instrument in writing (not under seal), *A.*, in consideration of 7000*l.* agreed to present to a rectory, on the next avoidance such person as *B.* should nominate, and to furnish an abstract and execute a conveyance of the next presentation to *B.*: Held, that this agreement did not require an *ad valorem* stamp. *Wilmot v. Wilkinson*, E. 8 G. 4. 506

- Plaintiff, having deposited money in the hands of the defendant, received from him the following memorandum, "Mr. *T.* has left in my hands 200*l.*" In an action to recover that money: Held, that the memorandum was admissible in evidence without a stamp. *Tomkins v. Ashby*, E. 8 G. 4. 541

- Where an instrument, which, in terms, purported to be a conveyance of land, but which, not being by deed, could not operate as such, contained a stipulation not to disturb the party intended to take the premises, in the enjoyment of them, was held to operate as an agreement, and to require a stamp appropriate to such instrument. *Rex v. Inhabitants of Ridgwell*, E. 8 G. 4. 665

- A bill of exchange was drawn in *Ireland* upon the stamp required by law, which was less in amount than the stamp required for such a bill drawn in *England*; but there was nothing on the face of the bill to shew that it had been drawn in *Ireland*. The holder in *England* neglected to present it for payment, and held it a month after it was due. The acceptor

acceptor having become bankrupt, the holder applied for payment to the indorser who had paid it to him. The latter refused to pay it, alleging that the holder had made it his own by his laches. The holder then threatened to sue him, alleging that the bill was void, on the ground that it was drawn on an improper stamp. The indorser inspected the bill, and finding that the stamp was not that required for a bill of the same amount drawn in *England*, but ignorant of the fact that it had been drawn in *Ireland*, paid the amount to the holder: Held, that this was money paid in ignorance of the fact, and there being no laches imputable to the party who paid the money, he might recover it back in an action for money had and received. *Milnes v. Duncan*, E. 8 G. 4. Page 671

STOPPAGE IN TRANSITU.

- Where goods are to be delivered to the vendee at a particular place, the *transitus* in general continues until they are delivered to him at that place, but if he by his own act prevent the delivery, which otherwise in the ordinary course would take place, and does any act equivalent to taking possession, the *transitus* is thereby terminated; and, therefore, where the vendee of several hogsheads of sugar upon receiving from the carrier notice of their arrival took samples from them, and for his own convenience desired the carrier to let them remain in his warehouse until he should receive further directions, and before they were removed became bankrupt, it was held that the *transitus* was at an end, and that the vendor was not entitled to

SUBSCRIBER.

stop them. *Foster and Others, Assignees, v. Frampton, M. T.G.b.*
Page 107

- Goods were purchased by a commission agent at Manchester for *A.* to be sent to *Lisbon*. *A.* had no warehouse at Manchester, and the vendor delivered the goods to the commission agent, who was to forward them to *Lisbon*: Held, that the *transitus* continued until they reached *Lisbon*, the place named by the vendee to the vendor, as the place of ultimate destination, and that the latter had a right to stop them in the hands of the agent, the vendee having become insolvent. *Coates and Another v. Railton and Another*, E. 8 G. 4. 422

SUBSCRIBER.

By an act of parliament passed for making a tunnel under the Thames, the company of proprietors were enabled to raise a sum of 200,000*l.* for the purpose of making the tunnel, and it was enacted that the persons who had subscribed, or who should thereafter subscribe, or advance money towards making the tunnel, should pay the sums by them respectively subscribed, at such times and places, and in such manner as should be directed by the directors; and in case any of such subscribers should neglect to pay the same at the time and place, and in manner so required for that purpose, the company, or their directors, were empowered to sue for and recover the same. By another section, reciting that the probable expenses would, according to the estimate thereof, amount to 160,000*l.*, and that the sum of 140,000*l.*, being more than four-fifth parts of such expenses, had already been subscribed for defraying such expenses

SURVEYOR'S ACCOUNTS.

pences by several persons, under a contract, binding them, their heirs, executors, and administrators, for payment of the several sums so subscribed by them respectively, it was enacted that the whole of the sum of 160,000*l.* should be subscribed in like manner, before any of the powers and provisions given by that act should be put in force: Held, that the word "*subscriber*," in this act of parliament, applied only to those who had stipulated that they would make payment, and not to all those who had already advanced money; and, consequently, that a person whose name was mentioned in the recital of the act of parliament as one of the original proprietors, and who had paid a deposit on eight shares, but who had not signed any contract, was not a *subscriber* within the meaning of the act, and not liable to be sued by the directors. *The Thames Tunnel Company v. Sheldon, H. 7 & 8 G. 4.*

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SURETY.

See BANKRUPT, 7.

SURRENDER.

See FERRY.

SURVEYOR'S ACCOUNTS.

By the 13 G. 3. c. 78. surveyors of highways are required to exhibit their accounts before one magistrate, and if he refuses to allow them, such parts as he objects to are to be investigated by the justices at petty sessions. Where surveyors exhibited their accounts before one magistrate, but did not take the assessments with them, for which reason the magistrate did not proceed to investigate the accounts, but referred the whole of them to the justices

TRESPASS. 777

at petty sessions, by whom they were allowed: Held, that such allowance was invalid. *The King v. The Justices of the North Riding of Yorkshire, H. 7 & 8 G. 4.*

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THAMES TUNNEL COMPANY.

See SUBSCRIBER, 1.

TITHES.

1. Where in debt for not setting out tithe of hay, plaintiff averred that there was a certain immemorial custom as to setting out the tithe "within the parish, and the limits, bounds, and tithable places thereof:" Held, that this averment was proved by evidence that the custom prevailed in all parts of the parish where tithe of hay was set out; and that proof of a modus for hay in one township made no difference. *Littledale J. dubitante. Pigott, Clerk, v. Bayley, M. 7 G. 4.* 16
2. Where a farmer pursued such a mode of harvesting barley that a considerable quantity of rakings were left scattered after the barley was bound into sheaves: Held, that tithe was payable in respect of these rakings, although no actual fraud was imputed to the farmer, and he and his servants were careful to leave as little rakings as possible in that mode of harvesting the crop. *Glanville v. Stacey, E. 8 G. 4.* 548

TITLE.

See VENDOR AND VENDEE, 9.

TRESPASS.

- A. employed B., an attorney, to enforce payment of a debt. B. directed his agent to sue out a *justices* in the county court. Before

Before the return of the *justices* the debtor paid debt and costs to *B*. His agent, not knowing of such payment, afterwards entered up judgment in the county court, although the defendant had not appeared, and sued out execution under which the goods of the debtor were seized: Held, that *A*. and *B*. were liable as trespassers. *Bates v. Pilling and Seddon*, M. 7 G. 4. Page 38

2. Where a constable, having a warrant to search for certain specific goods alleged to have been stolen, found and took away those goods, and certain others also, supposed to have been stolen, but which were not mentioned in the warrant, and were not likely to be of use in substantiating the charge of stealing the goods mentioned in the warrant: Held, that the constable was liable to an action of trespass. *Crozier v. Cundy and Others*, H. 7 & 8 G. 4. 232

3. No action will lie against the judge of a court of record for an act done by him in his judicial capacity; and, therefore, trespass cannot be maintained against a coroner for turning a person out of a room where he is about to take an inquisition. *Garnett v. Ferrand and Another*, E. 8 G. 4. 611

TROVER.

1. The vendor of a quantity of tin shipped the same on board a ship bound to *Leghorn* by the orders of the vendee. The captain, by his bill of lading, undertook to deliver the tin to an individual at *Leghorn*. The tin being heavy, was placed at the bottom of the hold, with other goods over it. The vendee having become bankrupt, the vendor required the captain to deliver up the tin, but did not tender the

VENDOR AND VENDEE

freight, or offer to make compensation to him for trouble of unloading the vessel. The latter refused, alleging that he had signed a bill of lading to deliver the tin to another person. Held, that this was sufficient evidence of a conversion. *Thompson and Others v. T. and Others*, M. 7 G. 4. Page 2.

Where *A*., having a debt from *B*. secured to him by warrant attorney, entered up judgment by *non sum informatus*, issued a *f. fa.*, and took from the sheriff a bill of sale of the goods seized, and *B*. having soon afterwards become bankrupt, his signees took possession of and sold the goods so transferred to *A*., who brought an action of trover for them: Held, that *A*. was not a creditor, having security for his debt within the 6 G. 4 c. 16. s. 108., and that he was entitled to recover. *Wynner v. Kemble and Masterman*, E. 8 G. 4. 471

TRUSTEE.

See MONEY HAD AND RECEIVED.

USES, STATUTE OF.

See DEED, 3.

USURY.

See ANNUITY.

VARIANCE.

See EVIDENCE, 10. *PLEADING*, 1. 7. 11.

VENDOR AND VENDEE.

1. Where a person who had contracted for the purchase of an estate, but had not obtained a conveyance, put up the estate for sale in lots by auction, and engaged to make a good title by a certain day, which he was unable to do, as his vendor never made a conveyance to him: Held,

Held, that a purchaser of certain lots at the auction might, in an action for not making a good title, recover not only the expenses which he had incurred, but also damages for the loss which he sustained by not having the contract carried into effect. *Hopkins v. Grazebrook, M. 7 G. 4.*

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2. Where goods are to be delivered to the vendee at a particular place, the *transitus*, in general, continues until they are delivered to him at that place. But if he by his own act prevent the delivery, which otherwise, in the ordinary course, would take place; and does any act equivalent to taking possession, the *transitus* is thereby terminated; and, therefore, where the vendee of several hogsheads of sugar upon receiving from the carrier notice of their arrival, took samples from them, and for his own convenience desired the carrier to let them remain in his warehouse until he should receive further directions, and before they were removed, became bankrupt: it was held, that the *transitus* was at an end, and that the vendor was not entitled to stop them. *Forster and Others, Assignees, v. Frampton and Another, M. 7 G. 4.* 107

3. Where a broker made an entry of a contract in his book which he did not sign, but sent to the vendor and purchaser bought and sold notes, copied from the book, and signed by him: Held, that these were a sufficient note or memorandum of the bargain, and that the parties were bound by the contract so made. *Goom v. Affalo, M. 7 G. 4.* 117

4. Where the owner of two adjoining closes (*A.* and *B.*), separated by a fence and gate, which had always been repaired by the

occupier of *B.*, sold *A.* to the plaintiff, and two years afterwards sold *B.* to the defendant: Held, that the latter was not bound to repair the gate, unless he or his vendor had made some specific bargain with the plaintiff to that effect; and that the doing of occasional repairs was not evidence of such bargain. *Boyle v. Tamlyn, H. 7 & 8 G. 4.* Page 329

5. *A.* on the 4th of January agreed to sell to *B.* a stack of hay for the sum of 145*l.*, to be paid on the 4th of February, the same to be allowed to stand on *A.*'s premises until the first of May. *B.* stipulated that the hay should not be cut until it was paid for: Held, that this was a contract for an immediate and not a future sale, and that the property in the hay passed by it immediately to the vendee, and that the same having been subsequently destroyed by fire, the loss fell upon him. *Tarling v. Baxter, H. 7 & 8 G. 4.* 360

6. *A.* having in his warehouse a quantity of sugar in bulk more than sufficient to fill 20 hogsheads, agreed to sell 20 hogsheads to *B.*, but there was no note in writing of the contract sufficient to satisfy the statute of frauds. Four hogsheads were delivered to and accepted by *B.* *A.* filled up and appropriated to *B.* 16 other hogsheads, and informed him that they were ready and desired him to take them away. *B.* said he would take them as soon as he could: Held, that the appropriation having been made by *A.*, and assented to by *B.*, the property in the 16 hogsheads thereby passed to the latter, and that their value might be recovered by *A.* under a count for goods bargained and sold. *Rohde and Others v. Thwaites, H. 7 & 8 G. 4.* 388

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Co. stopped payment on the same day at 11 o'clock in the morning, and never afterwards resumed their payments, but neither of the parties knew of the stoppage or of the insolvency of *D. & Co.* The vendor never circulated the notes or presented them to the bankers for payment, but on Saturday the 17th he required the vendee to take back the notes, and to pay him the amount, which the latter refused: Held, that under these circumstances the vendor of the goods was guilty of laches, and had thereby made the notes his own, and consequently that they operated as a satisfaction of the debt. *Camidge v. Allenby*, H. 7 & 8 G. 4.

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8. Goods were purchased by a commission agent at *Manchester* for *A.* to be sent to *Lisbon*. *A.* had no warehouse at *Manchester*, and the vendor delivered the goods to the commission agent, who was to forward them to *Lisbon*: Held, that the *transitus* continued until they reached *Lisbon*, the place named by the vendee to the vendor as the place of ultimate destination, and that the latter had a right to stop

WILL.

plies only to such warrants of attorney, &c. as fall within the former sections of the act, viz. warrants of attorney which, in the event of not being filed within twenty-one days after execution, are void against the assignees of a bankrupt, and, consequently, a warrant of attorney subject to a defeasance not written on the same paper or parchment is not void against the assignee of an insolvent debtor: Held, by Lord *Tenterden* C.J., *Bayley* and *Littledale* Js.; *Hobroyd* J. dissentient. *Morris v. Mellin*, E. 8 G. 4. Page 446

WILL.

Real estates will pass under the word *property* in a will, unless

WRIT OF ERROR. 781

there be other expressions to shew that it is used in a more confined sense; therefore, where a testator, after giving some pecuniary legacies, proceeded thus: "and all my property and effects of all claims I shall have I give to my brother *John*; but my mother is at liberty to give 1000*l.* of my property where she pleases:" it was held that the real estate passed to the brother. *Doe d. Morgan v. Morgan*, E. 8 G. 4.

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WRIT OF ERROR.

See PROHIBITION, 1.

END OF THE SIXTH VOLUME.









